to the district court's decision, that the release of the DOJ White Paper did constitute a "waiver of secrecy and privilege as to the legal analysis in the [OLC-DOD Memo]" and ordered the OLC-DOD Memo disclosed. *Id.* at 1124 (quoting *New York Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 116 (2d Cir. 2014)). Following the Second Circuit decision, the First Amendment Coalition sought to vacate the district court's grant of summary judgement and moved for attorney's fees. *Id.* at 1125. Because the district court was at fault for forcing litigation to continue, the First Amendment Coalition was both required to continue paying legal fees and was prevented from gaining access even sooner to the OLC-DOD Memo and OLC-CIA Memo. *Id.* at 1130. Thus, this third factual finding weighs in the First Amendment Coalition's favor as it was entitled to the documents at an earlier time but for the district court's error.

In *Schoenberg v. FBI*, the court found that certain information, which was only unredacted by the FBI after the filing of the lawsuit, should have been released by the FBI when the plaintiff initially requested it through the FOIA administrative process. 2020 WL 4937813, at *9-*12. Thus, "[p]laintiff was entitled to the information at the time of his FOIA request." *Id.* at *11. Likewise, in *Kopp v. U.S. Secret Serv.* the court held that the plaintiff was entitled to the documents in two of his three requests at an earlier time. No. 18-CV-04913-JCS, 2019 WL 2327933, at *5 (N.D. Cal. May 31, 2019). After receiving the requests, the Secret Service requested clarification in all three requests. *Id.* at *1. The court found, however, that the first two requests were sufficiently clear, which was demonstrated by the fact that the plaintiff's clarification letter did not "narrow in any way the scope of the original requests." *Id.* at *5. The Secret Service "failed to meet its obligation under FOIA" by requesting clarification rather than providing the documents from the first two requests. Thus, plaintiff was "entitled to the documents at an earlier time" due to the Secret Service's error. *Id.* at *5.

In several cases, courts held that delay beyond the deadline imposed by statute or regulation does not necessarily mean that the plaintiffs were forced to "endure unnecessarily protracted litigation." *First Amend. Coal.*, 878 F.3d at 1130. For example, in *Munene v. Talebian*, the EOIR had previously informed the plaintiffs that their request could be delayed due to the COVID-19 pandemic. 2022 WL 3975141, at *3. Thus, the court held that the "plaintiffs did not 'endure unnecessarily protracted litigation'" although the requests were not processed within the twenty-day statutory period. *Id.* at *4 (quoting *First Amend. Coal.*, 878 F.3d at 1130). The courts made an identical holding in *Rich v. U.S. Citizenship and Immigr. Servs.*, although the plaintiff had twice allowed for extensions beyond the twenty-day statutory period. 2020 WL 7490373, at *1, *3. In *Rich v. Exec. Off. of Immigr. Rev.*, plaintiff was required to wait over seven months—considerably longer than the enumerated thirty-day deadline. No. C20-1220-RAJ-MLP, 2021 WL 50863, at *3 (W.D. Wash. Jan. 6, 2021). Nevertheless, the court reached a similar holding as the EOIR was delayed by the COVID-19 pandemic. *Id.* Finally, in *Shaklee & Oliver, P.S. v. U.S. Citizenship & Immigr. Servs.*, the court held that a delay beyond the twenty-day statutory period, also in this case due to the COVID-19 pandemic, did not result in "unnecessarily protracted litigation." 2021 WL 4148175, at *1 (quoting *First Amend. Coal.*, 878 F.3d at 1130). In conclusion, the plaintiffs in these cases failed to demonstrate that they were "entitled to the documents at an earlier time." *First Amend. Coal.*, 878 F.3d at 1128. As a result, they were not eligible for attorney's fees.

Conclusion

In order for a litigant to be eligible to collect attorney's fees from a FOIA request, they must demonstrate that they have "substantially prevailed" in their request. *Id.* To do so, there must exist a "causal nexus between the litigation and the voluntary disclosure or change in

position by the Government." *Id.* Three factual findings are necessary for a court to determine whether a litigant has substantially prevailed: "(1) when the documents were released, (2) what actually triggered the documents' release, and (3) whether [the plaintiff] was entitled to the documents at an earlier time." *Id.* at 1129 (alteration in original) (internal quotation marks omitted) (quoting *Church of Scientology*, 700 F.2d at 492 (9th Cir. 1983)). A lengthy delay between the filing of the FOIA request and the release of the requested documents weighs in favor of plaintiffs as it demonstrates that only the "'dogged determination' of the plaintiff" resulted in a successful outcome. *Id.* (quoting *Exner*, 443 F. Supp. at 1353 (S.D. Cal. 1978)). Additionally, the plaintiffs must demonstrate that the litigation served as the trigger for the documents' release. The "mere fact that information sought was not released until after the lawsuit was instituted is insufficient to establish that a complainant has substantially prevailed." *Id.* at 1128 (internal quotation marks omitted). Finally, plaintiffs must prove that they were previously entitled to the documents and the withholding of those documents forced them to "endure unnecessarily protracted litigation." *Id.* at 1130. Only if a plaintiff convinces a court that these three factors all weigh in plaintiff's favor, will a court find that plaintiff "substantially prevailed" and is eligible for attorney's fees.

Applicant Details

First Name	**Hannah**
Middle Initial	**M**
Last Name	**Cumming**
Citizenship Status	**U. S. Citizen**
Email Address	**Brownhc@umich.edu**
Address	**Address** Street **7629 Mead Street** City **Dearborn** State/Territory **Michigan** Zip **48126** Country **United States**
Contact Phone Number	**2035356076**

Applicant Education

BA/BS From	**Princeton University**
Date of BA/BS	**June 2015**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 5, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Jessup International Law Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning Organization - Share the Wealth Program**

Recommenders

Niehoff, Leonard
lniehoff@umich.edu
Conlan, Lara
lara.conlan@protonmail.com
+61 473 560 037
Page, Susan D
sdpage@umich.edu
2023750046
Ciorciari, John
johncior@umich.edu
734.615.6947
Fisher, Betsy
blfisher@umich.edu

References

Richard Towle, former Adjudicator for the NZ Refugee Status Review Board (appeals) and recently retired senior UNHCR official, is also happy to act as a reference (ricktaupo@gmail.com | (917) 912-7299).

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I would be honored to serve as a clerk in your chambers for the 2024-2025 term or any future terms available. I am graduating in May 2024 from the University of Michigan Law School and Ford School of Public Policy with my J.D. and M.P.P.

Of all the judges that I am applying to across the country, you are my unequivocal first choice. From hearing over coffee from my 1L Criminal Law Professor Barbara McQuade how highly she thinks of you and then hearing the same from my fellow Princeton and Michigan classmate Dashaya Foreman (who will be clerking in your chambers this fall), to reading your story and your cases, I can imagine no better opportunity to learn and grow professionally. And it is for that reason that I am sending this paper application, now, ahead of the OSCAR posting. My husband and I would be thrilled to stay in Detroit and to continue to invest in the communities we love. From serving as Wayne County foster parents, to assisting refugees, to supporting my husband's ER residency and now work as an attending at Sinai Grace Hospital - we care about serving Detroiters well.

I am a uniquely experienced candidate who will bring both passion and maturity to the work in your chambers. I came to law school with six years of prior professional experience in finance, tech, and legal aid. During law school, I gave birth to two children while foster-parenting a third. My passion for justice took root early, as I grew up in the slums of Nouakchott, Mauritania. There, my surrogate grandmother Maryama told us of her escape from slavery. I witnessed ethnic cleansing attacks on our neighbors. The lessons they taught me both inspired and prepared me for the work I have done among other oppressed communities, at age eighteen when I deferred admission to Princeton and spent a gap year doing NGO work in North Africa, or at age twenty-five, when I left a comfortable job at Bain & Company to work as a legal aid for refugees.

While the majority of my pre-law school professional experience has been in the finance sector, I have always focused on seeking justice through systemic change. In my role as a portfolio research manager at a $10 billion ESG mutual fund, I worked for transformation in the finance industry. As a legal adviser at St. Andrew's Legal Aid Program, I fought for justice on behalf of asylum clients in their UNHCR hearings. I drafted dozens of briefs, closing statements, and legal filings. Working where my passion intersected with intellectually challenging, under-resourced problems energized me, igniting my decision to pursue law school.

In law school I've focused on the intersection of human and civil rights with corporate social responsibility. I've prioritized research and writing skills, whether representing clients in the Human Trafficking Clinic or winning a State Department bid to help implement the Uyghur Forced Labor Prevention Act; whether acting as an Editor for the Michigan Journal of Public Affairs or as a researcher for Associate Dean Ciorciari. I would be honored to use my experiences and passion to serve in your chambers and to expand on the foundation I have already built.

I have attached my resume, transcripts, writing samples, and letters of recommendation for your review. Richard Towle, former Adjudicator for the NZ Refugee Status Review Board (appeals) and recently retired senior UNHCR official, is also happy to act as a reference (ricktaupo@gmail.com | (917) 912-7299).

Thank you for your time and consideration.

Respectfully,

Hannah Cumming

Hannah Marie Cumming

7629 Mead Street, Dearborn, Michigan 48126 | brownhc@umich.edu | brownhcm@gmail.com | 203-535-6076

Education

UNIVERSITY OF MICHIGAN LAW SCHOOL Ann Arbor, MI
Juris Doctor, GPA: 4.00 Expected May 2024
Honors: Certificate of Merit (Book Award): International Refugee Law | Honors in Legal Practice / Writing | Dean's Scholarship
Activities: Equal Justice America Fellow | Fellow in Refugee and Asylum Law | Tutor for 1Ls: Criminal Law and Contracts Law | Jessup International Law Moot Court (Primary Oralist) | Michigan Innocence Clinic (upcoming)

UNIVERSITY OF MICHIGAN, Gerald R. Ford School of Public Policy Ann Arbor, MI
Master of Public Policy, GPA: 4.00 Expected May 2024
Honors: Weiser Diplomacy Fellow | Phi Kappa Phi Honor Society | Selected as Presenter at the Gramlich Showcase
Activities: Michigan Journal of Public Affairs, *Editor*, Vol. 19 | Co-drafted expert affidavit on Afghanistan for Associate Dean Ciorciari | U.S. State Department Diplomacy Lab: Strategies to Rebuild an Ethical Solar Supply Chain

PRINCETON UNIVERSITY Princeton, NJ
Bachelor of Arts, School of Public and Int'l Affairs, Minors in Arabic & Near Eastern Studies, GPA: 3.80 (*magna cum laude*) June 2015
Honors: Thesis: The Tunisian Revolution and Women's Status: Outcomes in the Law, Politics, and Media
Kathryn Davis Fellowship for Peace (selected as one of 100 national fellows; granted $10,000 for peacemaking work)
Activities: School Advisory Committee (elected by peers) |Princeton Disabilities Awareness (Executive Board) | Arabic Tutor
Study Abroad: AMIDEAST Program sponsored by the U.S. State Department (Amman, Jordan)

Experience

Human Trafficking Clinic, University of Michigan Law School Ann Arbor, MI
Student Attorney May–Aug. 2023

United Nations High Commissioner for Refugees New York, NY
Legal Fellow May–June 2022
- Advised the Deputy Director and attended UN meetings on his behalf; drafted response memos and talking points.
- Crafted policy recommendations for UNHCR's global engagements from Russia/Ukraine to ISIS returnees and sanctions.

Eventide Asset Management Boston, MA
Portfolio Team & Legal Work June 2021–Jan. 2023
- Met with C-suite executives to educate and advocate on the removal of forced labor from their supply chains.
- Created a whitepaper on Uyghur forced labor in the solar supply chain to engage large solar companies in our portfolio.
- Wrote our ESG policies with guidance from our General Counsel to ensure practices complied with SEC regulations.

Business 360 Program Manager (2 years) & Business 360 Analyst June 2018–November 2020
- Created and grew the Business 360 team and its proprietary approach to identifying ethical / ESG investment targets.
- Coordinated the work plan and deliverables for a six-person team; directly supervised three staff; reported to our CIO.

St. Andrew's Refugee Services: Refugee Legal Aid Program (RLAP) Cairo, Egypt
Legal Advisor for Refugee Status Determination (RSD) Aug. 2017–June 2018
- Represented clients in their native Arabic dialects for asylum hearings at the United Nations High Commissioner for Refugees.
- Wrote 10 appeal briefs and closing statements and 12 reopening filings; supported dozens of first-instance asylum applications.
- Several of my appeal briefs were accepted into the internal library as model language used by senior attorneys.
- Researched 8 countries (from Syria to South Sudan) for up-to-date facts to support asylum cases and global advocacy work.

Bain & Company San Francisco, CA
Associate Consultant Sept. 2015–Aug. 2017
- Conducted strategic M&A research for Intel in the ADAS space, including recommendations for the Mobileye acquisition.
- Co-created a five-year strategic plan for KIPP Schools. Co-authored whitepaper published in leading education journals.

Additional

Languages: Fluent: Modern Standard Arabic. Proficient: Egyptian, Levantine, Sudanese, and Ḥassāniyya Arabic dialects and French.
Volunteering: Princeton Prize for Race Relations Committee (2018–21); United Nations Women: Jobs Program (2013); CEOSS post-revolution reforms in Egypt (raised $10M funding grant) (2011); Doulos Health & Education Program in Mauritania (2010-11).
Interests: Foster parenting, eating spicy (global) food, exercise and nutrition nut, Jane Austen junkie, national park wanderer, surfer.

Hannah Marie Cumming

7629 Mead Street, Dearborn, Michigan 48126 | brownhc@umich.edu | brownhcm@gmail.com | 203-535-6076

Law School Transcript

Because I am a dual-degree student (JD/MPP) and took a semester's maternity leave, my law school program may be clearer with a short overview.

As of today, I have completed the equivalent of two years of law school classes. I completed my 1L year in Fall 2020 and Winter 2021 at the Law School. During Fall 2021 and Winter 2022, when I was also completing coursework for my Master of Public Policy at Michigan's Ford School of Public Policy, I completed the equivalent of a full semester's worth of law school classes (which you will see reflected on my transcript). During Fall 2022 I took a semester of maternity leave. During Winter 2023 I took classes at the Law School exclusively. This course of study sums to four semesters, or two years, of law school grades.

The law degree and Master of Public Policy, which take five years if taken independently, typically take four years on a dual-degree track. I will complete both degrees at an accelerated pace of 3.5 years of coursework, graduating in May 2024.

Please don't hesitate to reach out if you have any questions. Thank you for your time and consideration.

Respectfully,
Hannah Cumming

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Cumming,Hannah M
Student#: 10195274

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2020	**(August 31, 2020 To December 14, 2020)**							
LAW	510	003	Civil Procedure	Len Niehoff	4.00	4.00	4.00	A
LAW	520	003	Contracts	Kristina Daugirdas	4.00	4.00	4.00	A-
LAW	580	007	Torts	Sherman Clark	4.00		4.00	P
LAW	593	009	Legal Practice Skills I	Howard Bromberg	2.00		2.00	H
LAW	598	009	Legal Pract:Writing & Analysis	Howard Bromberg	1.00		1.00	H
Term Total				**GPA: 3.850**	**15.00**	**8.00**	**15.00**	
Cumulative Total				**GPA: 3.850**		**8.00**	**15.00**	
Winter 2021	**(January 19, 2021 To May 06, 2021)**							
LAW	530	003	Criminal Law	JJ Prescott	4.00	4.00	4.00	A
LAW	540	002	Introduction to Constitutional Law	Leah Litman	4.00	4.00	4.00	A-
LAW	594	009	Legal Practice Skills II	Howard Bromberg	2.00		2.00	H
LAW	724	001	International Refugee Law	Betsy Fisher	3.00	3.00	3.00	A+
Term Total				**GPA: 3.972**	**13.00**	**11.00**	**13.00**	
Cumulative Total				**GPA: 3.921**		**19.00**	**28.00**	
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
PUBPOL	510		Politics of Pub Pol	Internal transfer course	3.00		3.00	A
PUBPOL	580		Values&Ethics	Internal transfer course	3.00		3.00	A
Term Total					**6.00**		**6.00**	
Cumulative Total				**GPA: 3.921**		**19.00**	**34.00**	

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Control No: E196771001 Issue Date: 06/01/2023 Page 2

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Cumming,Hannah M
Student#: 10195274

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
PUBPOL	556		Macroeconomics	Internal transfer course	3.00		3.00	A
PUBPOL	582		Leading Organizations	Internal transfer course	3.00		3.00	A+
Term Total					**6.00**		**6.00**	
Cumulative Total				**GPA: 3.921**		**19.00**	**40.00**	
Winter 2023	**(January 11, 2023 To May 04, 2023)**							
LAW	482	001	Law and Theology	Len Niehoff	2.00	2.00	2.00	A+
LAW	509	001	Startups & Venture Capital	David Willbrand	2.00	2.00	2.00	A
LAW	626	001	Immigrant Justice Lab	Melissa Borja Amy Sankaran Jessica Lefort	3.00	3.00	3.00	A
LAW	741	001	Interdisc Prob Solv Indexing Forced Labor	Bridgette Carr Seth Guikema	3.00	3.00	3.00	A+
LAW	838	001	Law of Armed Conflict	Joshua Chinsky	2.00	2.00	2.00	A
LAW	900	393	Research	Patrick Barry	2.00		2.00	S
Term Total				**GPA: 4.125**	**14.00**	**12.00**	**14.00**	
Cumulative Total				**GPA: 4.000**		**31.00**	**54.00**	

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Cumming,Hannah M
Student#: 10195274

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2023	**(August 28, 2023 To December 15, 2023)**							
Elections as of:	06/01/2023							
LAW	536	001	Nat'l Security & Civ Liberties	Barbara Mcquade	3.00			
LAW	780	001	Human Rights: Themes and Var	Steven Ratner	3.00			
LAW	873	001	Legislation	William Novak	2.00			
LAW	976	001	Michigan Innocence Clinic	David Moran Elizabeth Cole Imran Syed	4.00			
LAW	977	001	Michigan Innocence Clinic Sem	David Moran Elizabeth Cole Imran Syed	3.00			

End of Transcript
Total Number of Pages 3

This transcript is printed on special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required.

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University of Michigan Law School Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

Third Party Recipients

As a third party recipient of this transcript, you, your agents or employees are obligated by the Family Rights and Privacy Act of 1974 not to release this information to any other third party without the written consent of the student named on this Cumulative Grade Report and Academic Record.

Official Copies

An official copy of a student's University of Michigan Law School Cumulative Grade Report and Academic Record is printed on a special security paper with a blue background and the seal of the University of Michigan. A raised seal is not required. A black and white is not an original. Any alteration or modification of this record or any copy thereof may constitute a felony and/or lead to student disciplinary sanctions.

The work reported on the reverse side of this transcript reflects work undertaken for credit as a University of Michigan law student. If the student attended other schools or colleges at the University of Michigan, a separate transcript may be requested from the University of Michigan, Office of the Registrar, Ann Arbor, Michigan 48109-1382.

Any questions concerning this transcript should be addressed to:

Office of Student Records
University of Michigan Law School
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-6499

UNIVERSITY OF MICHIGAN LAW
625 South State Street
Ann Arbor, MI 48109

LEONARD NIEHOFF
Professor from Practice

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write to offer my strongest possible recommendation in support of Hannah Cumming's application to serve as a clerk in your chambers.

I met Hannah as a first-year first-term student in my Civil Procedure course in the fall of 2020. That was at the height of COVID and classes were being conducted via Zoom. Hannah was the first student on whom I cold called on the first day of class. As you can imagine, the circumstances made for a daunting introduction to legal education.

Hannah nevertheless shone. Her answers were thoughtful and reflected diligent and careful preparation. She was poised and confident. Indeed, her responses to my questions were so uniformly excellent and so perfectly expressed that I stayed with her during that class much longer than I initially intended. It was a dazzling performance and, at the end, her fellow students couldn't resist cheering her on in the Zoom chat box.

Only later did I learn that Hannah had a 3-week-old newborn and an 11-year-old autistic foster daughter in the other room at the time. Indeed, Hannah cared for their autistic foster daughter for two years, while navigating her fully online COVID 1L year. During that time, she also supported her husband, an ER resident in Detroit, in his decision to take on extra ICU shifts at the height of the pandemic, intentionally accepting the risk to their family, foster daughter, and newborn.

In her 3L year, I had the pleasure of having Hannah in class again, this time in person and this time for my Law & Theology seminar. Throughout the term, Hannah's comments and questions were consistently smart, helpful, and respectful of the wide range of views reflected in the room. Her final paper was, as I have come to expect from Hannah, spectacular.

Hannah's transcript and cv testify to her tremendous intellectual horsepower. But I want to highlight a different quality, one that resists documentation but that will become evident to you as soon as you meet her. It is this: I believe Hannah Cumming to be one of the most deeply conscientious people I have ever known.

As I think you will immediately sense, Hannah has an unwavering dedication to do the right thing, to find the right answer, to work toward the best solution, and to leave anything she touches better than she found it. At the same time, there is nothing stuffy, superior, or self-righteous about her; nothing. She listens warmly, smiles easily, and is a complete pleasure to be around. I can say with confidence that she will be a fast favorite in the chambers of the judge wise enough to bring her aboard.

I have practiced law for almost forty years and have taught for almost as long. Over four decades, it has been my honor to mentor students and young lawyers who have gone on to become state and federal judges, United States Attorneys, law professors, and heads of their own law firms. I believe that, along the way, I have acquired an eye for talent.

So, let me say without hesitation or reservation: Hannah Cumming is special. She has boundless promise to make a difference in our profession and in our world. I look forward to seeing all the ways she will do it.

If you'd like additional information about Hannah, please feel free to email me at lniehoff@umich.edu or to call me at my personal cell phone number, 734-929-8243. I'd be happy to talk about her anytime.

Sincerely,

Len Niehoff

June 2023

Lara Conlan, L.L.B., L.L.M., Direct Supervisor

Dear Judge,

It is with great pleasure that I write to you with a letter of support for Hannah's application to clerk in your chambers. I supervised Hannah in Cairo, Egypt between August 2017 and March 2018 when she worked as a Legal Advisor in the Refugee Legal Aid Program (RLAP) at St. Andrew's Refugee Services. I received my L.L.B and L.L.M from the University of Bristol. I specialize within the field of Refugee Law; my prior experience includes working as the Deputy Director of the University of The Gambia's Law Clinic and as a Lecturer in Jurisprudence and Contract Law within its law faculty. Currently I work as a Solicitor at the Refugee and Immigration Legal Service in Melbourne, representing clients at the Administrative Appeals Tribunal and Department of Home Affairs.

Hannah possesses an incredibly multifaceted skillset and is without a doubt the most outstanding individual I have had the privilege to supervise in my career thus far.

Hannah quickly gained a reputation at RLAP for producing impeccable legal work and always went 'the extra mile' for clients: her attention to detail, the quality of her written work, her organization and her communication skills were unrivalled by other legal advisors. As a key example of her natural abilities, after her very first appeal screening, she produced a template to assess the legal merits of the case that was later adopted by the team, including senior legal officers. The legal arguments she made within these screenings also clearly demonstrated her ability to 'think outside the box' and tease out legal arguments that other advisors often overlooked or dismissed; the result of which had real consequences for refugees requiring legal assistance. Notably, I recall Hannah's thorough analysis and assessment of an unusual case relating to a Sudanese woman of Nuba Moro ethnicity. Hannah had conducted her own relevant country of origin research to back up her legal arguments and RLAP consequently represented the client on appeal. Further, her appeal briefs were always presented for review ahead of schedule and required very minor edits at most – a situation I had never experienced before from any other legal advisor.

Hannah also has the unique ability to critically evaluate issues and present solutions continually. This skill leads her to improve not only herself, but other individuals, organizations and systems. During her time at RLAP, she instigated and implemented a complete re-design of RLAP's Case Docket system, which was the primary database for processing tens of thousands of refugees. The re-design drastically improved the system's efficiency and accessibility, which will have a lasting beneficial impact on both the staff and clients for the foreseeable future.

In addition to Hannah's more technical skills outlined above, she is also honest, brave and fiercely committed to the administration of justice. Her motivations to serve social justice meant she never compromised on the high quality of her work, despite working in an overstretched and understaffed environment.

I can think of no better person to clerk in your chambers and I recommend Hannah with the utmost certainty.

Yours faithfully,
Lara Conlan

UNIVERSITY OF MICHIGAN LAW SCHOOL
625 S. State St.
Ann Arbor, Michigan 48109

Ambassador (ret.) Susan D. Page
Professor of Law

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

It is a privilege and honor to recommend in the strongest and most enthusiastic possible terms Hannah Cumming ("Hannah") for a clerkship in your chambers. My confidence in Hannah's unique abilities led me to reach out to her to ask if I could add my own letter of recommendation for her application to your chambers!

As a former career diplomat and lawyer and now a professor from practice at University of Michigan (U-M) Law School and professor of practice of international diplomacy at U-M's Gerald R. Ford School of Public Policy, I value critical thinking, sound analysis, intellectual curiosity, precise written and oral communications, and excellent people skills. Hannah possesses all of these qualities and skills in abundance, as well as a love of learning, a passionate commitment to justice, and a joyful spirit that shines light on everyone and everything around her!

From the moment Hannah walked into the first day of my public policy seminar, "Africa in Context," I could tell that she was a unique and remarkable individual. Her charisma in the classroom shone through in our daily discussions of Africa's history, laws, politics, development, diplomacy, and public policies. Classmates, staff, and professors gravitate to Hannah, drawn by her warm compassion, deep understanding, and humble spirit. Hannah possesses innate leadership skills, both inside and outside the classroom. She enriched classroom discussions with profound insights and valuable questions, while also cultivating a posture of active listening. Her love for other cultures and languages and people from different backgrounds and walks of life was evident, grounded in her childhood raised in the slums of Nouakchott. Her strong personal values and character underlie Hannah's passionate fight against unfairness, her pursuit of policies that favor justice and equality, and her desire to live a life of public service.

I have had the joy of building a mentorship relationship with Hannah outside of the classroom and getting to know both her and her family (including her two sons born during law school!!). She values deeply the apprenticeship model of learning and understands the wealth of knowledge, insight, and meaningful relationship that comes from it. She seeks out every opportunity to learn from this model, asking questions and challenging the boundaries of her understanding with gusto. Unlike most of my public policy or law students, Hannah actually asks how she can write better, analyze more clearly, and understand more deeply – not for the sake of a better grade, but because she genuinely seeks to become better!

In addition to her academic and professional accomplishments, Hannah is a person of high integrity, courage, and humility, with a fierce dedication to the administration of justice. Her positive energy and sense of humor is infectious. Everyone who meets Hannah instantly discovers her inner light. She's an exercise and nutrition fiend who has tried everything from distance running, to hot yoga, HIIT, CrossFit, and barre blend. She also has a passion for highly organized and effective systems – testament to her dedication to the administration side of law and policy. Watching Hannah with her two boys is a joy; she loves to have spontaneous kitchen dance parties with her toddlers. She has a deep and genuine interest in knowing people's stories, regardless of whether she's speaking with a former ambassador like me, or learning how to roll the perfect stuffed grape leaves from her Lebanese great-grandmother-like neighbor in the ethnic community she and her husband chose to live in when they moved to Michigan.

In sum, Hannah is amazing! She possesses all of the technical skills to be an incredible asset and all of the personal qualities of someone you will come to see as a trusted advisor and friend. I recommend Hannah Cumming most strongly for your chambers. Please do not hesitate to contact me if I can provide any additional information on Ms. Cumming or if I can be of any further assistance or answer any questions.

Sincerely,
Ambassador (ret.) Susan D. Page

Susan D Page - sdpage@umich.edu - 2023750046

GERALD R. **FORD SCHOOL** OF PUBLIC POLICY
UNIVERSITY OF MICHIGAN

May 31, 2023

Recommendation Letter for Hannah Cumming

Dear Sir/Madam:

I am writing to recommend Hannah Cumming enthusiastically for a judicial clerkship. I have known Hannah for about four years and have found her to be among the most intellectually gifted, professionally skilled, and principled students I have taught in recent memory. She has a passion for the law and a keen understanding of legal principles and practice. She also has an earnest commitment to the advancement of justice in the United States and internationally. I believe she is an exceptional candidate for a clerkship.

I first got to know Hannah when we began recruiting her to the Ford School and offered her a Weiser Diplomacy Fellowship—one of a select few awards we offer to top students interested in international affairs. Her excellent undergraduate record at Princeton, her work supporting refugees in Egypt, her evident leadership and communication skills, and her enviable language ability were among the qualities that impressed me from the start. We were delighted when she chose to join our community in 2020 as a joint JD/MPP student, and we have benefitted greatly from her involvement. She has been, without question, one of our best students in recent years.

In fall 2021, Hannah was a standout in my course on foreign policy and international relations, earning the highest grade in the course. Her knowledge of international law and politics is broad and deep, her analysis is persuasive, her writing is lucid, and her in-class contributions were consistently insightful and nuanced. She wrote three papers for the course, all of which were exceptionally strong. One was a mock briefing to Secretary of State Tony Blinken on how U.S. policy could best advance human rights protections for the Uighur population in Xinjiang. Another was a paper outlining the shortcomings of the proposed EU Pact on Migration and Asylum—an outstanding critique coupled with concrete and realistic suggestions on how the European refugee framework could be amended to make it more humane, equitable, and efficient. Hannah also wrote about genocide punishment and prevention in Tigray and led a student roundtable on that important topic.

I then had the privilege of working with Hannah in early 2022 to support the asylum application of a recent graduate from the Ford School from Afghanistan. With Hannah's help, I prepared an expert affidavit on country conditions in Afghanistan and the applicant's need for asylum. As usual, Hannah demonstrated both an excellent understanding of relevant political and security conditions in Afghanistan and the ability to connect those clearly and convincingly to relevant standards and principles in asylum law. Her work helped make the asylum application successful.

Hannah has also pursued many other activities germane to her interests in law, human rights, and refugee issues. She has been a lead oralist at the Jessup International Law Moot Court, has earned fellowships for her work on equal justice and refugee and asylum law, and has been an editor for the *Michigan Journal of Public Affairs*, among other roles. She also led a group of students

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working with the U.S. State Department through its Diplomacy Lab program to research ethical supply chain policies and practices with respect to Xinjiang. I oversee Diplomacy Lab at Michigan and heard her present her findings to State Department officials and to a public audience at the Ford School's annual student showcase. Her grasp of the material, her thoughtfulness about relevant law and policy, and her presentation were all among the best I have heard in years of supervising such projects. Hannah's performance at Michigan has simply been stellar.

Hannah also has been making good use of her summers to hone her practical skills in law and policy. She was a legal fellow last summer with the UN High Commissioner for Refugees and is spending this summer working with the University of Michigan's Human Trafficking Clinic. She is gifted both in the study of law and in practical, hands-on service provision—a combination that bodes well for her success in the field.

Last but not least, Hannah is a delightful person. She is principled, affable, and sincere; works well in groups; and is committed to public service. I have engaged with many law students in the classroom here at Michigan and at other universities and in my own career as a law student and lawyer. I am confident that Hannah will be an outstanding law clerk and use what she learns to build an immensely productive career in law and policy. I have not encountered a student whom I would recommend to you more highly for a clerkship.

Thanks very much for your consideration.

Sincerely,

John D. Ciorciari, JD, DPhil
Associate Dean for Research and Policy Engagement
Professor of Public Policy
Director, International Policy Center
Director, Weiser Diplomacy Center

UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write to recommend Hannah Cumming for a clerkship in your chambers. I believe that Hannah's academic excellence, professional experience, and dedication to public interest work, indicate that she will be an excellent judicial clerk. I am a practicing attorney and currently serve as the U.S. Director of the international nonprofit Talent Beyond Boundaries. I am also a lecturer in International Refugee Law at the University of Michigan Law School.

I first met Hannah during the Winter 2021 semester when she was a student in my International Refugee Law class. Throughout the semester, she was consistently engaged and thoughtful in her class participation. In many conversations, she sought to clarify her own understanding and to learn how to build upon what she had seen when representing refugees in legal processes prior to law school.

She received the top grade in the class based on an excellent exam, class presentation, and class contributions. For example, students were required to write a short blog post about a recent policy change in refugee law. Hannah wrote a detailed analysis of recent regulatory changes in the U.S. related to internal relocation requirements. Her post was unusually detailed for an extremely complex area of law that was subject to regulatory change and litigation changing it. She provided an effective summary and a nuanced assessment of the compliance of U.S. policy with international law norms.

Before entering law school, she had already built up significant previous professional experience, including supporting direct legal representation for refugees at Saint Andrew's Refugee Services (StARS), one of the most respected refugee legal aid organizations in the world. She has also worked in management consulting at Bain and Eventide Asset Management, and as a result, brings with her an even temperament, maturity, and excellent time management skills.

Hannah's academic performance is all the more impressive in light of the breadth of her commitments. She has managed full-time coursework in a dual-degree program with outstanding marks, while working part-time with Eventide and as a tutor, doing pro bono legal work through the Michigan chapter of the International Refugee Assistance Project, editing the Michigan Journal of Public Affairs, and raising two children.

In my experience, Hannah is a thoughtful colleague to her peers and a proactive professional who improves those around her. This includes in my course; it was my first time teaching, and Hannah frequently "stayed" after our Zoom class meetings to offer polite and considered suggestions to improve student engagement or to note a particularly effective curricular choice.

Hannah is enrolled as a dual-degree student and will receive a master's degree in public policy from Michigan's Ford School. In the future, Hannah hopes to partner her legal experience, gained from her summer internship and future direct representation, with public policy expertise to effect broader change. Hannah's focus as she completes law school and begins her professional career is to work in direct representation, understanding that her ability to advocate on the policy level starts with working directly with clients.

Hannah clearly has immense potential to achieve great impact with her excellent legal training, public policy exposure, and dedication to a legal career advancing the public interest. I recommend her to you without reservation for a clerkship.

Respectfully submitted,

Betsy Fisher
Lecturer, International Refugee Law, University of Michigan Law School
U.S. Director, Talent Beyond Boundaries
blfisher@umich.edu

Hannah Marie Cumming

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Writing Sample 1

I prepared this brief on behalf of an unaccompanied Afghan minor seeking asylum in the United States. As a student in the Immigrant Justice Lab at University of Michigan Law School, I prepared this brief for use by the Michigan Immigrant Rights Center (MIRC). I have replaced the client's real name with the name John to protect his confidentiality. This writing sample is my own work. While the supervising attorney at MIRC along with my professor provided some comments on the draft, all edits are my own. The following excerpt includes one of the primary arguments from the full forty-page brief.

BRIEF IN SUPPORT OF APPLICATION FOR ASYLUM, WITHHOLDING OF REMOVAL, AND RELIEF UNDER THE CONVENTION AGAINST TORTURE

OVERVIEW

John is a 16-year-old boy and citizen of Afghanistan seeking asylum in the United States under section 208 of the Immigration and Nationality Act ("INA"). John's asylum claim is based on his well-founded fear of future persecution on account of his actual and imputed political opinion and his membership in the particular social group ("PSG") of Afghan children who fled Afghanistan with the aid of the U.S. military after the Taliban takeover. John is unable to safely relocate within Afghanistan due to the Taliban's control over Afghanistan. If John were forcibly returned to Afghanistan, he would be received by Taliban officials who have his photograph and have access to vast biometric databases. Even in the unlikely event that John escaped the notice of Taliban officials at the airport, John's neighbors are members of the Taliban who know that he fled to the United States. The Taliban would immediately identify John and persecute him on return.[1]

* * *

A. The Persecution John Fears is on Account of His Actual and Imputed Political Opinion

An applicant can establish a political opinion claim by showing that he will be persecuted in the future because of his political opinion. *Petrosyan v. Holder*, 558 F. App'x 519, 525 (6th Cir. 2014). The applicant can do so by demonstrating (1) that he acted based on a political opinion and (2) that his actions would be interpreted as such by his alleged persecutors. *Petrosyan v. Holder*, 558 F. App'x 519, 525 (6th Cir. 2014). An imputed political opinion is one where a persecutor attributes political beliefs to an applicant and persecutes him as a result, regardless of whether he

[1] "WHY THE AFGHAN SECURITY FORCES COLLAPSED." 2023. Special Inspector General for Afghanistan Reconstruction. https://www.sigar.mil/pdf/evaluations/SIGAR-23-16-IP.pdf.

actually holds those beliefs. *See Koudriachova v. Gonzales*, 490 F.3d 255, 264 (2d Cir. 2007). John holds an actual and imputed anti-Taliban political opinion, which he has clearly expressed through his actions, his words, and even his physical appearance. Even if his actions do not establish an actual political opinion claim, there is no doubt the Taliban would perceive John as possessing an anti-Taliban political opinion, establishing an imputed political opinion claim. The Taliban are motivated to harm John because of his anti-Taliban political opinion, as demonstrated by (1) their violent attack on him at the airport, (2) their ongoing persecution of his family, (3) their pattern and practice of killing Western returnees, and (4) their persecution of Western sympathizers whose appearance violates their strict Islamic customs.

i. John Sincerely Holds an Actual and Imputed Anti-Taliban Political Opinion Manifested Through His Overt Act of Fleeing, His Own Words, and His Appearance

An applicant does not need to demonstrate that he joined a political party to demonstrate an actual political opinion. *Mandebvu v. Holder*, 755 F.3d 417, 429 (6th Cir. 2014). An applicant does not need to protest to demonstrate political opinion. *Perafan Saldarriaga v. Gonzales*, 402 F.3d 461, 466 (4th Cir. 2005) (holding that "less overtly symbolic acts may also reflect a political opinion" where it is "motivated by an ideal or conviction"). Children can hold and express a political opinion. *See Salaam v. INS*, 229 F.3d 1234, 1239 (9th Cir. 2000) (reversing agency decision of adverse credibility finding based on the agency's determination that it was implausible for an 18-year-old to be vice president of a branch of an opposition movement); *see also Civil v. INS*, 140 F.3d 52, 55 (1st Cir. 1998) (criticizing IJ's finding that it was "almost inconceivable to believe that the Ton Ton Macoutes could be fearful of the conversations of 15-year-old children").

A political opinion can be expressed through actions rather than words. *Osorio v. I.N.S.*, 18 F.3d 1017, 1030 (2d Cir. 1994). *Martinez v. Garland*, No. 21-3312, 2022 WL 2160668, at *5 (6th Cir. June 15, 2022). Those actions can be affirmative or negative. *Mandebvu v. Holder*, 755

F.3d 417, 429 (6th Cir. 2014). For example, "a refusal to support a cause … can express a political opinion as effectively as an affirmative statement or affirmative conduct." *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 486 (1992) (Stevens, J. dissenting). Opposition to a persecutor's use of violence can constitute a political opinion when a political organization has a pattern of violent acts to promote their agenda. A pattern of violence is "integral to the party and inextricably linked to their political activities, rather than constituting mere unrelated acts of violence." *Regalado-Escobar v. Holder*, 717 F.3d 724, 729 (9th Cir. 2013).

John holds an anti-Taliban political opinion which he has clearly expressed through his actions, his words, and even his physical appearance. The fact that John was a minor at the time he fled Afghanistan does not diminish the intensity or credibility of his anti-Taliban political opinion. John affirmatively expressed his political opinion through the overt act of fleeing Afghanistan. The Taliban have declared *jihad* (religious war) against "intruders" and "occupiers" from the West.[2] They view America as an enemy state – the antithesis of their political and religious ideologies.[3] Thus, the Taliban view returnees as having "clearly defected to the other side," marking them as targets for violent retribution and execution. By choosing to defect to America, John has aligned himself with the "enemy" and shown that he opposes the Taliban's government.

John has expressed his political opinion through both negative and affirmative actions. He has expressed his political opinion in the negative by refusing to remain in Afghanistan and support the Taliban, even though he is of eligible age (as an able-bodied teenage boy) and from suitable ethnic and social circumstances (as a young Pashtun man living in a neighborhood with many

[2] "Afghan Nationals Perceived as 'Westernised.'" 2020. European Asylum Support Office. https://www.ecoi.net/en/file/local/2036956/2020_09_Q19_EASO_COI_Query_Response_AFG_Westernisation.pdf.
[3] Semple, Michael. 2014. "RHETORIC, IDEOLOGY, AND ORGANIZATIONAL STRUCTURE OF THE TALIBAN MOVEMENT." United States Institute of Peace. https://www.usip.org/sites/default/files/PW102-Rhetoric-Ideology-and-Organizational-Structure-of-the-Taliban-Movement.pdf.

Taliban members).[4] By choosing not to remain in Afghanistan and not to support the Taliban, John has singled himself out from other Pashtun boys of comparable age and social circumstances.[5] In their own communities, Afghans perceived as Western sympathizers have faced politically motivated attacks based on "[their] perception as traitors."[6]

John has singled himself out by refusing to wear traditional Afghan clothing, contrary to expectations growing up in a Taliban-populated neighborhood. John intentionally dressed in a Western manner while living in Afghanistan, wearing jeans and a t-shirts and styling his hair, for example. These actions demonstrate John's anti-Taliban beliefs. The Taliban have described Afghans who resist wearing traditional Taliban clothing as "disrespecting Islam." They have "flogged" young boys for wearing Westernized clothing as generic as a t-shirt.[7]

John's opposition to the Taliban's strategy of violence also constitutes a political opinion claim. The Taliban's strategy of violence is integral to their party platform and inextricably linked to their political activities; it constitutes more than mere unrelated acts of violence. The Taliban have a pattern of intense surveillance coupled with gruesome extrajudicial killings of Afghans, which includes prolonged torture of victims before execution. John has verbalized his opposition to the Taliban's violent practices. He believes "the Taliban should not exist" because "the Taliban use force to scare people into agreeing with them." He has also said, "the Taliban are killing people

[4] "Country Guidance: Afghanistan." 2021. EUAA: European Union Agency for Asylum. https://euaa.europa.eu/country-guidance-afghanistan-2021.
[5] "Afghanistan: Taliban Child Soldier Recruitment Surges." 2016. Human Rights Watch. https://www.hrw.org/news/2016/02/18/afghanistan-taliban-child-soldier-recruitment-surges.
[6] Australia: Refugee Review Tribunal. 2006. "Afghanistan: 1. What Is the Position Now in Afghanistan Generally, and in Particular for Hazaras in Kabul and Mazar-e-Sharif? That Is, Has the Removal of the Taliban from Power Been Durable, and Stable? 2. Please Provide Information about Commanders Zeya and Shafi Deewana. 3. What Is the Present Role of Wahdat in Afghan Politics? 4. Can a Hazara Safely Return to Kabul and/or Mazar-e-Sharif Directly (e.g., by Plane), or Do They Have to Return through Occupied and/or Dangerous Areas? 5. How Are Persons Who Have Been Westernised Treated in Afghanistan, Kabul and Mazar-e-Sharif?" Australia: Refugee Review Tribunal. https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4b6fe11b0&skip=0&query=AFG30446%20&coi=AFG.
[7] Averre, David. 2021. "Taliban Are 'flogging' People in the Streets for Wearing Western Clothing as the Price of Burqas in Kabul Doubles." *Daily Mai*, August 23, 2021. https://www.dailymail.co.uk/news/article-9918925/Taliban-flogging-people-streets-wearing-western-clothing.html.

in Afghanistan for not agreeing with them. A government is supposed to ensure the safety of their citizens, but the Taliban do not. The Taliban take away people's freedoms." As a result, John says, "I am afraid that I will be harmed or killed by the Taliban because of my anti-Taliban political opinion."

John's fear of the Taliban is not based on personal conflict with the Taliban but rather on true political opposition. *See Zoarab,* 524 F.3d at 782 (finding no evidence that a petitioner who called the prince of the United Arab Emirates corrupt was expressing opposition to the government, as opposed to confronting the prince over a business deal gone sour, because the petitioner did not make any public statements of political opposition). *Mandebvu v. Holder*, 755 F.3d 417, 429-30 (6th Cir. 2014). Unlike the petitioner in *Zoarab*, John's anti-Taliban political opinion is based on his fundamental criticism of the Taliban regime and their violence against Afghans, including coercion and suppression of freedoms. Unlike the petitioner in *Zoarab,* who criticized a specific prince for corrupt actions, John has expressed criticism of the Taliban government as a whole. He stated that the Taliban should not exist due to their failure to protect Afghan citizens and their fundamental rights and freedoms.

ii. Even If the Taliban are Not Aware of John's Actual Political Opinion, They Would Still Perceive John as Having an Anti-Taliban Political Opinion

An imputed political opinion is one where a persecutor attributes political beliefs to an applicant and persecutes him as a result, regardless of whether he actually holds those beliefs. *See Koudriachova v. Gonzales*, 490 F.3d 255, 264 (2d Cir. 2007) (finding that "the relevant question is not whether an asylum applicant subjectively holds a particular political view, but instead whether the authorities in the applicant's home country perceive him to hold a political opinion and would persecute him on that basis"). The Sixth Circuit has held that an imputed political opinion is a protected ground for asylum. *Haider*, 595 F.3d at *284-85; Pascual v. Mukasey*, 514 F.3d 483, 486-87 (6th Cir. 2007) (noting that most circuit courts have approved this approach, that

this court did so in *Abdulnoor*, and that the Supreme Court's emphasis on the persecutor's motive suggests this approach is appropriate). An imputed political opinion is one where the "persecutors *believe* [the petitioner] holds that opinion." *Cruz-Carrillo v. Lynch,* 651 F. App'x 368, 371 (6th Cir. 2016) (citing *Haider v. Holder*, 595 F.3d 276, 284-85 (6th Cir. 2010)).

A person's actions alone can be the basis for an imputed political opinion claim. *Cruz-Carrillo v. Lynch*, 651 F. App'x 368, 371 (6th Cir. 2016). Persecution based on appearance can also constitute persecution based on perceived political opinion. *Chicas-Padilla v. U. S. INS*, No. 89-70092, 1990 U.S. App. LEXIS 19161, at *8-9 (9th Cir. Oct. 29, 1990) (finding that the BIA erred where it held that the military did not detain and beat the applicant based "on account of political opinion," considering that "certain students, because of their general appearance, were presumed to have opinions hostile to the government").

If the Taliban are not made aware of John's actual political opinion, they would still perceive John as having an anti-Taliban political opinion. John's actions alone are sufficient to establish his imputed political opinion. *Cruz-Carrillo v. Lynch*, 651 F. App'x 368, 371 (6th Cir. 2016). If John were returned to Afghanistan, the Taliban would consider his act of fleeing Afghanistan and defecting to the West as an act of overt opposition to their regime. The Taliban would correctly conclude that John holds an anti-Taliban political opinion. The Taliban would also perceive John's appearance in Western dress as additional evidence of his anti-Taliban political opinion, as evident in their public statements that this clothing "disrespects Islam."[8] For an Islamic government like the Taliban, disrespect for Islam equates to political opposition. As evidence of this attitude, the Taliban have a pattern and practice of flogging young men for wearing t-shirts and other Western clothing.[9] The Taliban would also view his family's resistance to their attacks

[8] Ibid.
[9] Ibid.

as an expression of their anti-Taliban political opinion. Consequently, they would perceive his family's political resistance as further evidence of John's anti-Taliban political opinion.

iii. The Taliban are Motivated to Harm John Based on His Political Opinion

Nexus is established if the applicant provides "*some* evidence of [the motive], direct or circumstantial," but the applicant need not prove the exact motive of his persecutor. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). When there are no obvious grounds for personal conflict and the persecutor's abuse follows "a confrontation charged with political meaning," then "the only fair inference is that the abuse was a result of political opinion." This inference is especially true when the opposition conduct is "relatively public." *Zoarab v. Mukasey*, 524 F.3d 777, 782 (6th Cir. 2008). *Mandebvu v. Holder*, 755 F.3d 417, 429-30 (6th Cir. 2014). Where it is clear that "there is no evidence of a legitimate prosecutorial purpose for a government's harassment of a person ... there arises a presumption that the motive for harassment is political." *In Re S-P-*, 21 I. & N. Dec. 486, 491–92 (BIA 1996) (quoting *Singh v. Ilchert*, 63 F.3d 1501 (9th Cir. 1995).

The Taliban are motivated to harm John because of his anti-Taliban political opinion, as demonstrated by (1) their actions at the airport, (2) their ongoing persecution of his family, (3) their pattern and practice of killing returnees, and (4) their persecution of perceived Western sympathizers whose appearance violates their strict Islamic customs. First, the Taliban already demonstrated when they beat him at the airport, took his picture, and threatened to shoot him if he ever returned to Afghanistan, that they perceive John's departure as an expression of his opposition to the Taliban. The Taliban's abuse of John followed a confrontation "charged with political meaning," namely John's successful escape from Afghanistan. His opposition conduct was also "relatively public" as it happened at the airport.

There is no evidence of a legitimate prosecutorial purpose against John. Thus, the only fair inference is that the Taliban's abuse of John was on account of his perceived and actual anti-Taliban

political opinion. This abuse and the Taliban's clear verbal threat, "if you return, I will shoot you in your head," establish their clear motive to harm him. In addition to motive, the Taliban have the means to identify John based on the photograph they took of him and their access to vast biometric databases, which they have already used to identify individuals.[10]

Second, the Taliban's motive and capacity to harm John is demonstrated by their ongoing threats and violent attacks against his family members. The Taliban directly threatened John's father and brother, saying, "We will shoot you all." The Taliban visited the phone shop owned by John's older brother and stabbed him in the hand, hospitalizing him. Many of the family's neighbors are Taliban members and John's family have informed him of ongoing killings in their neighborhood.

Third, the Taliban have routinely executed Western returnees similarly situated to John. They view Afghan returnees as infidels, traitors, and spies from the West, who have "clearly defected to the other side" and deserve death.[11] In recent years, the Taliban have killed at least four known returnees who had been in Western "infidel occupier" countries, such as Norway and the United Kingdom.[12] The Taliban also killed at least nine failed asylum seekers who were forcibly repatriated to Afghanistan by Australia.[13] The Taliban have waged a campaign of arrests and

[10] "WHY THE AFGHAN SECURITY FORCES COLLAPSED." 2023. Special Inspector General for Afghanistan Reconstruction. https://www.sigar.mil/pdf/evaluations/SIGAR-23-16-IP.pdf.
[11] "Afghanistan: Compilation of Country of Origin Information (COI) Relevant for Assessing the Availability of an Internal Flight, Relocation or Protection Alternative (IFA/IRA/IPA) to Kabul." 2019. UN High Commissioner for Refugees (UNHCR). https://www.refworld.org/docid/5def56204.html.
[12] "Afghan Nationals Perceived as 'Westernised.'" 2020. European Asylum Support Office. https://www.ecoi.net/en/file/local/2036956/2020_09_Q19_EASO_COI_Query_Response_AFG_Westernisation.pdf.
[13] Australia: Refugee Review Tribunal. 2006. "Afghanistan: 1. What Is the Position Now in Afghanistan Generally, and in Particular for Hazaras in Kabul and Mazar-e-Sharif? That Is, Has the Removal of the Taliban from Power Been Durable, and Stable? 2. Please Provide Information about Commanders Zeya and Shafi Deewana. 3. What Is the Present Role of Wahdat in Afghan Politics? 4. Can a Hazara Safely Return to Kabul and/or Mazar-e-Sharif Directly (e.g. by Plane), or Do They Have to Return through Occupied and/or Dangerous Areas? 5. How Are Persons Who Have Been Westernised Treated in Afghanistan, Kabul and Mazar-e-Sharif?" Australia: Refugee Review Tribunal. https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4b6fe11b0&skip=0&query=AFG30446%20&coi=AFG.

revenge killings against other returnees.[14] They have likely suppressed from public reporting the true numbers of executions and detentions of Western returnees.

In conclusion, John holds a clearly articulated anti-Taliban political opinion, as demonstrated by his words and actions – wearing Western clothes, refusing to stay under the Taliban regime, and defecting to the United States. The Taliban would undoubtedly perceive these actions as demonstrating John's anti-Taliban political opinion, regardless of whether they were aware of his actual political opinion. The Taliban are motivated to harm John on account of his political opinion, as demonstrated by their violent attack on him at the airport, threats to shoot him on return, continued violence towards his family members, and pattern and practice of executing Western returnees.

* * *

CONCLUSION

John has established that he has a well-founded fear of future persecution on account of his actual and imputed political opinion and his membership in the particular social group of Afghan children who fled Afghanistan with the aid of the U.S. military after the Taliban takeover. John has substantiated this fear with corroborating testimony and significant record evidence including country condition reports, expert reports, and news articles. Therefore, he respectfully requests that this adjudicator exercise its discretion favorably and grant his request for asylum. In the alternative, he requests that his applications for withholding of removal or CAT protection be granted.

[14] Ibid.

Hannah Cumming

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Writing Sample 2

I prepared this appellate brief for my legal practice course in April 2021. This writing sample is my own work and received some light comments from my legal practice professor. It is an excerpt from a longer twenty-three page brief.

April 7, 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 20-CV-9137

BETH REID AND FRANKLIN STATE DEPARTMENT OF INFRASTRUCTURE,

PLAINTIFFS-APPELLANTS,

v.

AMERICAN INFRASTRUCTURE AGENCY AND BEAU WILSON, Director.

DEFENDANTS-APPELLEES.

BRIEF FOR THE PLAINTIFFS-APPELLANTS

Associate Cumming
Attorneys for the Plaintiffs-Appellants

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A. THE CWI UNCONSTITUTIONALLY COERCES FRANKLIN BY TYING LARGE-SCALE INFRASTRUCTURE FUNDING TO A NEW CONDITION – THE MARIJUANA PROHIBITION.

1. The Marijuana Prohibition unconstitutionally coerces Franklin because it threatens a large amount of critical funding that sustains Franklin's tourism-based economy.

2. The CWI represents a shift in kind, not merely degree, because it is a new program that has a new purpose and structure.

a) The CWI is a new program with a new name.
b) The CWI has a new purpose: to coerce Franklin to enforce the Prohibition.
c) The CWI has a new structure.

3. The CWI's shift in kind is coercive because it ties existing FWIA funding to a new condition, the Marijuana Prohibition.

B. THE MARIJUANA PROHIBITION'S BAN ON EMPLOYING ALL MARIJUANA USERS AND CARDHOLDERS IS NOT REASONABLY RELATED TO THE FUNDING'S PURPOSE TO ENSURE SAFE INFRASTRUCTURE.

C. BY REQUIRING THE STATES TO ENFORCE THE MARIJUANA PROHIBITION, THE AIA OBSCURES THE RESPONSIBLE FEDERAL ACTORS AND THREATENS THE POLITICAL ACCOUNTABILITY ESSENTIAL TO OUR FEDERAL SYSTEM.

CONCLUSION……21

QUESTIONS PRESENTED

1. Does the CWI unconstitutionally coerce Franklin by tying large-scale pre-existing infrastructure funding to a new condition – the Marijuana Prohibition?
2. Is the Marijuana Prohibition's ban on employing all marijuana users and cardholders reasonably related to the FWIA's purpose to ensure safe infrastructure?
3. Does the AIA's requirement that the states enforce the Marijuana Prohibition obscure the responsible federal actors and undermine the political accountability essential to our federal system?

STATEMENT OF THE CASE

Plaintiffs-Appellants Beth Reid and the Franklin State Department of Infrastructure ("FSDI") appeal the lower court's grant of Defendants-Appellees' Motion for Summary Judgment and denial of Plaintiffs-Appellants' Cross-Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56(a). Plaintiffs-Appellants seek relief against Defendants-Appellees, the American Infrastructure Agency ("AIA") and AIA Director Beau Wilson ("the director"), on the grounds that the federal government exercised its spending power in violation of the Tenth Amendment by unduly coercing the State of Franklin. R. at 36.[1]

The 2001 Federal Works Initiative Act (FWIA) provides federal funding for state infrastructure projects. The AIA is a federal agency that administers the FWIA through successive four-year "works initiatives." R. at 19. The President appoints the AIA's director and meets with the director, who in turn "set[s] the policy for the AIA—consistent with the Executive Branch and the enabling statute, the FWIA." The director also "oversees the . . . guidelines for evaluating funding proposals" and gives "final approval on all proposals." R. at

[1] "R" refers to the record on appeal.

19. The purpose of the FWIA grants, according to the AIA's current director Beau Wilson, is "to help America achieve the infrastructure greatness of the past, providing money for states to build roads, bridges, dams, runways, railroads, lakes . . . airports." R. at 19. To apply, state infrastructure agencies submit project proposals to fund large infrastructure projects. R. at 32.

The works initiatives include the Standard Works Initiative (SWI) and the subsequent Clean Works Initiative (CWI), which fund the FSDI. The AIA first funded the SWI in 2001, renewing its funding several times before discontinuing it in 2020. R. at 32. The AIA through the FWIA grants $200 million annually to the FSDI. R. at 38. These funds go towards Franklin's public works projects, including roadbuilding, airport runway development, and other vital infrastructure expansions that sustain its tourism economy. R. at 16, 38. The FSDI uses these funds to pay contractors to manage and operate the infrastructure projects. R. at 6, 15.

In 2020, the AIA replaced the SWI with the CWI – a new program that has a new purpose and structure. Congress did not raise new funding for the CWI; rather it reallocated existing funding from the SWI to the CWI – approximately thirteen billion dollars nationwide. R. at 30–32. Eighty percent of CWI funding proposals were previously SWI projects, compared to eighty-five percent project retention in past cycles. R. at 22-24. Past grounds for non-renewal included complete failure to make progress on the project (ten percent) or corruption (five percent). R. at 32. Applications for the CWI are submitted like those for the SWI, as a single application with several projects reviewed annually. R. at 22.

* * *

Finding that "their hands were tied," the FSDI complied with the Marijuana Prohibition and fired twenty-five "valuable" personnel, including work site coordinators, office managers, warehouse foremen, and program coordinators. R. at 24–25. These layoffs included former

program coordinator Beth Reid, who originally obtained her medical marijuana card as a protective measure against debilitating seizures. R. at 15–17. She never used marijuana on or off the job, earned promotions for her work, and was considered "valuable and well-trained." R. at 25. Both parties agree that the sole reason Reid's contract ended was because of her status as a medical marijuana cardholder. R. at 38. She stated "[i]n my opinion, it's ridiculous that I have to choose between my work and my health." R. at 17.

On November 28, 2020, Defendants-Appellees filed a Motion for Summary Judgement in the district court for the district of Franklin on the grounds that there was no genuine dispute of material fact and they were entitled to judgment as a matter of law. On November 30, 2020, Plaintiffs-Appellants opposed Defendants-Appellees' Motion and filed a Cross-Motion for Summary Judgment. On December 9, 2020, the district court granted Defendants-Appellees' Motion for Summary Judgment and denied Plaintiffs-Appellants' Cross-Motion for Summary Judgment pursuant to Federal Rules of Civil Procedure 56(a). On December 22, 2020, Plaintiffs-Appellants appealed to the United States Court of Appeals for the Fifth Circuit, on the grounds that the federal government abused its spending power under the Tenth Amendment by unduly coercing Franklin.

STANDARD OF REVIEW

This appeal is from the district court's grant of Defendants-Appellees Motion for Summary Judgment. This Court reviews a district court's grant of summary judgment *de novo*. *In re Louisiana Crawfish Producers*, 852 F.3d 456, 462 (5th Cir. 2017). Pursuant to the Federal Rules of Civil Procedure 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The Court must view the evidence, resolve all ambiguities, and draw reasonable

inferences in favor of the non-moving party. Fed. R. Civ. P. 56(c); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the responsibility of establishing the basis for its motion and identifying supporting portions of the record. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

ARGUMENT

The federal government can impose conditions on funding to states if the conditions comply with the five-part test articulated in *South Dakota v. Dole*, 483 U.S. 203 (1987): (1) federal funding must benefit the general welfare; (2) any condition on the funds must be unambiguous; (3) any condition must be reasonably related to the purpose of the federal grant ("nexus"); (4) the grant and any conditions attached to it cannot violate any independent constitutional provision; and (5) the grant and its conditions cannot amount to coercion as opposed to encouragement. *Id.*

The Marijuana Prohibition fails *Dole's* nexus (3) and coercion (5) prongs and threatens federal political accountability. The Prohibition's ban on marijuana cardholders and marijuana use outside the workplace is not reasonably related to the grant's purpose to safely build infrastructure. Furthermore, the CWI unconstitutionally coerces Franklin by tying large-scale existing FWIA funding, which sustains Franklin's tourism-based economy, to a new condition – the Prohibition – which fundamentally alters the program. Finally, by requiring Franklin to enforce the Prohibition, the AIA obscures its role as the responsible federal actor and threatens the political accountability essential to our federal system.

A. THE CWI UNCONSTITUTIONALLY COERCES FRANKLIN BY TYING LARGE-SCALE INFRASTRUCTURE FUNDING TO A NEW CONDITION – THE MARIJUANA PROHIBITION.

The CWI threatened to terminate Franklin's federal infrastructure funding if the state did not comply with the Marijuana Prohibition. Conditions on federal grants to states cannot amount to coercion as opposed to encouragement. *Dole*, 483 U.S. at 211. A conditional grant is coercive: (1) when the amount of funding in question is substantial and vital to the state's economy, (2) when the program represents a shift in kind, not merely degree, and (3) when the new conditions are tied to existing funding. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 523 (2012).

In *Sebelius*, the Court held that the Affordable Care Act's Medicaid expansion exceeded Congress's power under the Spending Clause because the expansion "crossed the line distinguishing encouragement from coercion."[2] *Id.* at 579. When Congress offers financial inducement that is "more than relatively mild encouragement" and constitutes "a gun to the head," it oversteps the bounds of federalism. *Id.* at 581. And when conditions "take the form of threats to terminate significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes." *Id.* at 580*; see also Gruver v. Louisiana Bd. of Supervisors for Louisiana State Univ. Agric. & Mech. Coll.*, 959 F.3d 178, 184 (5th Cir. 2020) (holding that *Sebelius* constrained Congress from conditioning all of a state's existing funding on significant obligations that create an entirely new program).

Here, the CWI and its Marijuana Prohibition resemble the coercive characteristics of the Medicaid expansion in *Sebelius*. First, the Prohibition is coercive because it threatens *all* of Franklin's federal infrastructure funding – funding that sustains Franklin's struggling tourism

[2] Chief Justice Robert's opinion in *Sebelius* is controlling, as the plurality's narrowest opinion. *Marks v. United States*, 430 U.S. 188, 193 (1977) (holding that the narrowest possible opinion in a plurality controls).

economy. Second, the creation of the CWI represents a shift in kind, not merely degree: the CWI is an entirely new program that has a new purpose and structure. And finally, the AIA coercively conditioned existing FWIA funds on Franklin's compliance with the Marijuana Prohibition.

1. <u>The Marijuana Prohibition unconstitutionally coerces Franklin because it threatens a substantial quantity of critical funding that sustains Franklin's tourism-based economy</u>.

The Marijuana Prohibition is unconstitutionally coercive in light of the magnitude of critical funding Franklin stands to lose. Specifically, (1) the amount of funding, (2) the relative percentage of the state budget, (3) the state's financial dependence on the funding, (4) and the implications for state taxes all resemble the factors in *Sebelius* that rendered the threat to Medicaid funding "economic dragooning that leaves the States with no real option." *Sebelius*, 567 U.S. at 523. Franklin stands to lose *all* of its federal infrastructure funding if it ignores the Prohibition, just as states in *Sebelius* stood to lose *all* Medicaid funding if they opted out of the expansion. R. at 25. *Id*. at 581. In contrast, the states in *Dole* only stood to lose five percent of federal funds, "a relatively small percentage." *Dole*, 483 U.S. at 211.

Franklin's loss in funding comprises a significant percentage of its infrastructure budget and its state budget more broadly. In *Sebelius*, federal funding covered fifty to eighty-three percent of states' pre-expansion Medicaid spending. *Sebelius*, 567 U.S. at 581. Likewise, federal funding covers eighty percent of Franklin's infrastructure budget. Franklin's loss in funding amounts to 3.3% of its overall state budget. In contrast, the threatened loss in *Dole* would have impacted less than half of one percent of South Dakota's budget. *Gruver*, 959 F.3d at 184. In *Sebelius*, the loss in federal funding impacted over ten percent of the state's budget, which the Court described as "economic dragooning." *Sebelius*, 567 U.S. at 523. Franklin's loss in funding

is seven times the loss in *Dole* but only one-third the loss in *Sebelius*. R. at 25. Thus, the impact on Franklin's state and infrastructure budgets more closely resembles the impact in *Sebelius*.

Compounding this impact, Franklin's "financial viability" *depends* on building their infrastructure, because it sustains their tourism industry. R. at 25. Former program coordinator Reid stated that the federal funding is keeping "Franklin afloat financially." R. at 16. Franklin has already been struggling to regain its economic stability since the financial crisis. R. at 25. Allowing roads, bridges, and airports to fall into disrepair would have an exponential impact on Franklin's tourism-based economy beyond the loss of funding itself.

While the closure of the University of Franklin freed up approximately $100 million in the budget, administrators are "jockeying" for those funds. Even if the FSDI were to receive *all* that funding, it would only cover forty percent of the total infrastructure budget. Combined with twenty percent from in-state funding, that would leave FSDI operating at sixty percent of its required budget. R. at 25–26.

Alternatively, Franklin would need to raise state taxes on their citizens on top of existing federal taxes, crippling their economy even more. These financial implications resemble those in *Sebelius* where states were forced to choose between "either a drastic reduction in funding for other programs or a large increase in state taxes . . . on top of the federal taxes already paid by the State's citizens to fund the Medicaid program." *Id.* at 672 (Scalia, J., dissenting).

It is true that Medicaid represented a larger loss in absolute dollars: $269.5 billion nationwide in 2010 compared to the CWI's cost of $13 billion nationwide in 2020. *Id.* at 628 (Ginsburg, J., concurring in part); R. at 32. But *Sebelius* did not emphasize the dollar amount so much as the impact of a percentage loss on a state's ability to fund their economy's vital operations, whether citizens' healthcare or the roads they drive on. *Id.* at 581. Franklin has

already been struggling to regain its economic stability since the financial crisis. R. at 25. Losing eighty percent of its infrastructure budget could push Franklin over the edge into insolvency.

Thus, in the amount of funding at issue (*all* of it), as a relative percentage of the budget, and in light of Franklin's financial dependency and the implications for state taxes, the Marijuana Prohibition most closely resembles the coercive financial threats in *Sebelius*.

2. The CWI represented a shift in kind, not merely degree, because it is a new program that has a new purpose and structure.

* * *

a) The CWI is a new program with a new name.

* * *

b) The CWI has a new purpose: to coerce Franklin to enforce the Prohibition.

The CWI has a new purpose, just as Medicaid expansion had a new purpose. While the prior iteration of Medicaid covered four particular groups, new Medicaid created a "comprehensive national plan to provide universal health insurance coverage." *Id.* at 583. It had "*no purpose* other than to *force* unwilling states to sign up for the dramatic expansion in health care coverage effected by the Act." *Id.* at 580 (emphasis added). Whereas the SWI's purpose was to build safe infrastructure for Franklin, the CWI's purpose is to force the states into banning marijuana users and cardholders in the workplace, under the pretense of building safe infrastructure. But Congress "lacks the power to compel the States to require or prohibit [certain] acts." *Koog v. United States*, 79 F.3d 452, 456 (5th Cir. 1996). *See also New York v. United States*, 505 U.S. 144, 149 (1992) (holding that it violates the Tenth Amendment for Congress to issue regulatory commands to the states). *See also Printz v. United States*, 521 U.S. 898, 902 (1997) (holding that it violates the Tenth Amendment for the federal government to issue

commands to state officers). The CWI's true purpose is to force the states to ban marijuana use and cardholder status.

The administration's stated policy objectives, viewed in light of the director's social media communications and Franklin's position as a marijuana legalization leader, suggest coercive motives. AIA director Wilson argued that the Prohibition is necessary because marijuana is dangerous to workers and illegal at the federal level. R. at 13. With these goals in mind, the AIA could have given states any number of guidelines or incentives to improve worker safety, such as site testing or mandated accident reduction. If the AIA were truly focused on safety, the Prohibition could have also banned drugs like Adderall or OxyContin. But rather than focusing on safety more broadly, or limiting testing to marijuana *use on the job*, the Prohibition targets marijuana *users* at large, forcing the states to intrude into their citizens' private lives.

The director's tweets imply that the administration wants to make states ban all marijuana users and cardholders from employment. He tweeted in April 2019, "[f]ederal Gov should step in and prevent states from employing toke smokers. @POTUS" and in July 2019, "[f]ed Gov should step in and make sure Franklin does not grant money to projects that employ pot smokers because #weedstinks." R. at 34–35. Then in December 2019, he tweeted that "states will no longer be able to endanger workplaces with dangerous marijuana use." R. at 27. Phrases like the federal government will "make sure" and "states will no longer be able" demonstrate intent to coerce the states. Franklin was a natural target as a pioneer in marijuana legalization. FSDI program coordinator Reid noted that "Franklin led the way [in legalizing marijuana] for the other 50 states, and now the administration is trying to pull us back." R. at 17.

While the director does not officially speak for the administration, he sent these tweets after he was appointed in February 2019. The director is a man who both has the ear of the

President and "set[s] the policy for the AIA—consistent with the Executive Branch and the enabling statute, the FWIA." He also "oversees the . . . guidelines for evaluating funding proposals" and gives "final approval on all proposals." R. at 19. The President and the director decided together that "the next Works Initiative should impose higher standards" because "the terms of the SWI were inadequate to further policy goals." R. at 19–20.

In light of the administration's stated policy goals, the director's tweets, and Franklin's position as a leader in legalization, the AIA had "*no other purpose* than to *force* unwilling States to sign up for" restrictions on marijuana usage, just as new Medicaid forced states to sign up for comprehensive healthcare. *Sebelius*, 567 U.S. at 580 (emphasis added).

c) The CWI has a new structure.

* * *

3. The CWI's shift in kind is coercive because it ties existing FWIA funding to a new condition, the Marijuana Prohibition.

By tying existing funding streams to new conditions, the AIA used Franklin's economic dependency on the grants to force the state to accept policy changes on marijuana. Though the CWI is a new program that has a new purpose and structure, its funding source remains the same. Like its predecessor the SWI, the CWI is funded by the AIA through the FWIA grants. R. at 31–32. Congress has not raised new funding; rather existing funding has been reallocated from the SWI to the CWI, around $13 billion nationwide. R. at 32.

Congress is not free to take away states' existing funding if they choose not to participate in a new program. *Id*. at 582. When funding conditions threaten existing grants, "the conditions are properly viewed as a means of pressuring the States to accept policy changes." *Id*. at 580. The AIA has committed exactly this constitutional trespass by threatening to take away Franklin's existing FWIA funding if it does not participate in the Prohibition.

In order to overcome the sixty-five-point funding threshold, Franklin must comply with the Marijuana Prohibition. The Prohibition imposes a thirty-five-point penalty on the FSDI and other programs unless they deny employment to marijuana users and cardholders. R. at 13. The penalty is approximately one-third of the total possible points and over half of the required points for funding. In contrast, the other new penalties only deduct two points. Previous grounds for non-renewal were much harsher – complete failure to make progress (ten percent) or corruption (five percent). R. at 21.

If Franklin does not comply, the thirty-five-point penalty would sink its score below the required funding threshold. R. at 32. Before the Prohibition, the AIA gave the "upper quartile" programs in the 2016–2020 cycle an average score of eighty-five. A thirty-five-point deduction would put even a high-performing agency at fifty points, well below the sixty-point threshold. R. at 12. An average agency has no real choice. FSDI has consistently received a score of sixty-five over the deputy administrator's "entire tenure" and "despite best efforts, [she] reasonably expects [the] score to remain unchanged." Thus, it would be "completely impossible to make up the thirty-five-point deduction." R. at 26.

There can be no cooperative federalism where one party is never given the opportunity to decide whether to cooperate. *Koog,* 79 F.3d at 462. Franklin has no real choice. In the words of former program coordinator Reid, the FSDI's "hands were tied" and they were "a puppet of the administration" because "so long as [they] hired contractors who carry medical marijuana . . . the administration will withhold the federal grant." R. at 16.

It is true that AIA director Wilson presented the Marijuana Prohibition as an "optional benefit" and "just a consideration—like any other—that goes into evaluating a grant." R. at 21–22. While the condition could be optional for a high performing state at ninety-five points (if

such a state exists), or for a state with ample in-state funding, the Prohibition is in no way optional for the average state like Franklin. Rather, the Prohibition amounts to a gun to the head.

While nothing precludes Congress from offering new funds and requiring states to comply with conditions on their use, no new funds have been offered here. *Sebelius*, 567 U.S. at 585. Rather, the AIA tied old funds to new conditions, leaving Franklin no meaningful choice.

In sum, the CWI and its Marijuana Prohibition fail *Dole's* coercion prong because they (1) threaten a large amount of funding critical to Franklin's economy, (2) represent a shift in kind, not merely degree, and (3) tie new conditions to existing FWIA funding.

B. THE MARIJUANA PROHIBITION'S BAN ON EMPLOYING ALL MARIJUANA USERS AND CARDHOLDERS IS NOT REASONABLY RELATED TO THE FUNDING'S PURPOSE TO ENSURE SAFE INFRASTRUCTURE.

* * *

C. BY REQUIRING THE STATES TO ENFORCE THE MARIJUANA PROHIBITION, THE AIA OBSCURES THE RESPONSIBLE FEDERAL ACTORS AND THREATENS THE POLITICAL ACCOUNTABILITY ESSENTIAL TO OUR FEDERAL SYSTEM.

When the federal government forces states to implement a federal program, doing so "threaten[s] the political accountability key to our federal system." *Sebelius,* 567 U.S. at 578. A threat to political accountability, occurs when "[c]itizens upset by unpopular government action . . . may ascribe to state officials blame more appropriately laid at Congress's door." *Id.* at 630 (Ginsburg, J., concurring in part) This danger is "heightened when Congress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers." *Id*. at 578. Thus, federal coercion of state governments "blurs political accountability, a democratic value protected by the principles of federalism." *Koog*, 79 F.3d at 457.

Here, Franklin has pioneered marijuana legalization, suggesting a citizenry that supports legalization. R. at 17. The Prohibition forced FSDI to fire twenty-five core managerial personnel, ranging from program coordinators, to office managers and warehouse foremen. R. at 25. The number and range of personnel shows that marijuana use spans a broad cross-section of Franklin's society. Former program coordinator Reid stated, "[i]n my opinion, it's ridiculous that I have to choose between my work and my health." R. at 17. Her opinion may reflect the opinions of other Franklin citizens. If the Prohibition proves unpopular, some disgruntled citizens may seek political action.

The state workers themselves may understand that the federal agency, the AIA, handed down the Prohibition. But as layoffs impact families and communities, the average Franklin citizen is unlikely to understand the complex hierarchy of the FWIA, AIA, FSDI, and CWI. Thus, the Prohibition unconstitutionally obscures responsible federal actors. It resembles the Brady Handgun Act, where the court worried voters might blame the states for the federal government's decision to spend local law enforcement funds on background checks. *Koog*, 79 F.3d at 460*; see also Printz*, 521 U.S. at 902. Similarly, the AIA is forcing Franklin to spend its funds on marijuana testing. By coercively requiring the states to implement the Prohibition, the AIA obscures the responsible federal actors and creates a problem of political accountability; citizens may ascribe blame to Franklin more appropriately laid at Congress's door.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants Beth Reid and the Franklin State Department of Infrastructure respectfully request that this Court enter an order denying Defendants-Appellees' Motion for Summary Judgement and awarding Plaintiffs-Appellants their

costs and fees associated with this Motion and such other relief as this Court deems appropriate.

The Court should grant summary judgment in favor of Plaintiffs-Appellants.

Dated: April 7, 2021

Respectfully Submitted,

Associate Cumming

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Applicant Education

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Date of BA/BS	**May 2021**
JD/LLB From	**Stanford University Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90515&yr=2011**
Date of JD/LLB	**June 16, 2024**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Stanford Law Review**
Moot Court Experience	**No**

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June 24, 2023

The Honorable Stephanie Dawkins Davis
U.S. Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am a rising third-year student at Stanford Law School and write to apply to serve as your law clerk in 2024-25. I am interested in working for the government and would be eager to learn from your experience as an Assistant U.S. Attorney.

Enclosed please find my resume, references, law school transcript, and two writing samples for your review. Professor Buzz Thompson, Professor Lawrence M. Friedman, and Professor Robert Weisberg are providing letters of recommendation in support of my application.

I welcome the opportunity to discuss my qualifications further. Thank you for your consideration.

Sincerely,

Hutchinson Fann

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EDUCATION

Stanford Law School Stanford, CA
J.D., expected June 2024
Journal: *Stanford Law Review* (Vol. 76: Online Editor; Vol. 75: Member Editor); Award for Outstanding Member Editor Team (Vol. 75)
Activities: Research Assistant to Lawrence M. Friedman and Buzz Thompson; Asian and Pacific Islander Law Students Association; Native Law Pro Bono; William A. Ingram Inn of Court (Pupil)

Pomona College Claremont, CA
B.A., *magna cum laude*, in Philosophy, Politics, and Economics (PPE), May 2021
Honors: Downing Scholarship recipient (full merit scholarship for MPhil at the University of Cambridge); Phi Beta Kappa (elected in 2020); Distinction in the Senior Exercise; Pomona College Scholar; Level II musical performer (highest level); Pomona College Humanities Studio (Fellow)
Activities: Taught English at a local mosque, Classical Guitar Quartet, Academic Affairs Committee

University of Oxford, St. Edmund Hall, Visiting Student, Politics, 2019-20 Oxford, United Kingdom

EXPERIENCE

Holwell Shuster & Goldberg LLP, New York, NY *Summer Associate*, Aug. – Sept. 2023

Sullivan & Cromwell LLP, New York, NY *Summer Associate*, June – Aug. 2023

U.S. Department of Justice, Criminal Appellate Section, Washington, D.C. *Legal Intern* (Spring 2023)
Drafted the government's brief in opposition to a petition for certiorari in the U.S. Supreme Court. Drafted sections of briefs for cases in the U.S. Courts of Appeals. Reviewed court decisions adverse to the United States and drafted memos to the Solicitor General about whether the government should appeal.

Stanford Law School Stanford, CA

Professor Lawrence M. Friedman *Research Assistant*, Nov. 2022 – present
Co-authoring an article on the newspaper coverage of abortion in the late nineteenth century. Also assisted with a forthcoming book, an article on the history of workers' compensation, and an article on the history of abortion in the United States.

Professor Buzz Thompson *Research Assistant*, Sept. 2022 – present
Co-authoring an article on the impact of California's statutory human right to water. Assisted with a forthcoming book on the business of water.

Independent Research: "The Effect of Enforcement of Gratuitous Promises" Sept. 2022 – present
Received funding from Stanford to conduct original research into how the legal enforcement of promises impacts the utility of the receiver of the promise. Supervised by Professor Julian Nyarko.

King & Spalding, New York, NY *Summer Associate*, June – Aug. 2022
Drafted part of a motion to dismiss and prepared legal memoranda on a breach of contract, force majeure, and new international arbitration rules, among other topics. Received an offer to return during summer 2023.

Oxford Review of Books, Oxford, UK *Commissioning Editor*, Apr. 2020 – Mar. 2021
Reviewed proposals for publication; worked with writers for both print and online publication.

Professor Amanda Hollis-Brusky, Pomona College *Research Assistant*, Jan. 2018 – May 2019
Assisted with the book *Separate but Faithful* (Oxford University Press, 2020). Received acknowledgement in the book and cited for coining a term used in the book. Wrote and presented two spin-off articles at Western Political Science Association conferences (see below).

Office of U.S. Senator Dianne Feinstein (D-CA), San Francisco, CA *Intern*, May – July 2019

Interests: Spanish (proficient speaker and writer), classical guitar, comparative religion, podcasting

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PUBLICATIONS AND PRESENTATIONS

"The Libertarian and Conservative Christian Divide on Natural Law and Natural Rights," Western Political Science Association (undergraduate panel), 2021

"Natural Law and Christian Worldview Institutions," Western Political Science Association (undergraduate panel), 2020

"Perspectives: Stuttering," KQED, a National Public Radio (NPR) member radio station, 2017

TEDxUCLA, classical guitar, 2017

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Program : Law JD
09/20/2021 : Law (JD)
Plan
Status Active in Program

-------- Beginning of Academic Record --------

2021-2022 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	201	CIVIL PROCEDURE I	5.00	5.00	H	
Instructor:		Zambrano, Diego Alberto				
LAW	205	CONTRACTS	5.00	5.00	P	
Instructor:		Nyarko, Julian				
LAW	219	LEGAL RESEARCH AND WRITING	2.00	2.00	H	
Instructor:		Handler, Nicholas A				
LAW	223	TORTS	5.00	5.00	H	
Instructor:		Mello, Michelle Marie Studdert, David M				
LAW	240J	DISCUSSION (1L): RELIGION, IDENTITY AND LAW	1.00	1.00	MP	
Instructor:		Sonne, James Andrew				

LAW TERM UNTS: 18.00 LAW CUM UNTS: 18.00

2021-2022 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	203	CONSTITUTIONAL LAW	3.00	3.00	H	
Instructor:		Meyler, Bernadette				
LAW	207	CRIMINAL LAW	4.00	4.00	H	
Instructor:		Weisberg, Robert				
LAW	224A	FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK	2.00	2.00	P	
Instructor:		Thesing, Alicia Ellen				
LAW	4018	INTELLECTUAL PROPERTY: INTERNATIONAL AND COMPARATIVE COPYRIGHT	2.00	2.00	P	
Instructor:		Goldstein, Paul L				

LAW TERM UNTS: 11.00 LAW CUM UNTS: 29.00

2021-2022 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	217	PROPERTY	4.00	4.00	H	
Instructor:		Thompson Jr, Barton H				
LAW	224B	FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE	2.00	2.00	H	
Instructor:		Thesing, Alicia Ellen				
LAW	7017	CREATION OF THE CONSTITUTION	4.00	4.00	P	
Instructor:		McConnell, Michael				

LAW TERM UNTS: 10.00 LAW CUM UNTS: 39.00

2022-2023 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	400	DIRECTED RESEARCH	3.00	3.00	H	
Instructor:		Nyarko, Julian				
LAW	2002	CRIMINAL PROCEDURE: INVESTIGATION	4.00	4.00	H	
Instructor:		Weisberg, Robert				
LAW	7108	STATE CONSTITUTIONAL LAW	3.00	3.00	H	
Instructor:		Schacter, Jane				
LAW	7836	ADVANCED LEGAL WRITING: APPELLATE LITIGATION	3.00	3.00	MP	
Instructor:		Makhzoumi, Katherine				

LAW TERM UNTS: 13.00 LAW CUM UNTS: 52.00

2022-2023 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	400	DIRECTED RESEARCH	2.00	2.00	H	
Instructor:		Thompson Jr, Barton H				
LAW	1013	CORPORATIONS	4.00	4.00	P	
Instructor:		Milhaupt, Curtis				
LAW	7001	ADMINISTRATIVE LAW	4.00	4.00	H	
Instructor:		Freeman Engstrom, David				

LAW TERM UNTS: 10.00 LAW CUM UNTS: 62.00

2022-2023 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	884	EXTERNSHIP, SPECIAL CIRCUMSTANCES	12.00	0.00		
Instructor:		Weisberg, Robert				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 62.00

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Fann,Hutchinson
Student ID : 06115479

END OF TRANSCRIPT

Barton Thompson
Robert E. Paradise Professor of Natural Resources Law
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buzzt@stanford.edu

June 24, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing to recommend Hutchinson Fann for a clerkship in your chambers. Hutchinson is exceptionally smart, as well as a terrific researcher and writer. He is personable and reliable and works hard at everything he does. He has all the attributes that you would want in a clerk and thus has my strongest recommendation.

Hutchinson was my research assistant last fall (2022) and helped me both edit a new book that is about to be published and research a future article on California's recognition of the human right to water. He did a superb job on both projects. Hutchinson proved to be an excellent editor. Hutchinson read through my entire draft, found ways to improve it, caught errors, and checked all of my citations. His suggested edits were excellent, increasing clarity and eliminating unnecessary verbiage. Hutchinson also did a great job of substantively checking every citation, ensuring that they supported the text, and proofreading the citations for style. Hutchinson did a similarly superb job of researching California's statutory recognition of the human right to water. He tracked down the legislative history of the state statute, which was not easy both because California legislative histories are never easy to compile and because it took several years and several bills to get the law passed. Hutchinson also tracked down and analyzed every place where the human right to water has been cited in subsequent legislation, administrative regulations, and agency policies.

Given Hutchinson's great research for me on California's human right to water, I asked him to join me as an author of the paper that I am writing on the subject (something that I seldom do with students). His research, and enthusiasm for the topic, however, convinced me that he would be an excellent co-author. His work on the article over the last two quarters has confirmed my instinct. The article looks at California's statutory recognition of the human right to water, which expressly provides that the right is not enforceable in court, and asks two questions. First, what is the value of a "right" that is not enforceable? Second, are there any unique benefits to having an unenforceable right? To help answer these questions, Hutchinson conducted extensive research on international "soft law" and its domestic counterparts. He and I also have been interviewing scores of activists, government officials, and others involved with the human right to water in California. Hutchinson has done a terrific job in both the research and the oral interviews. He also has prepared an initial draft of the first section of the paper. As I hoped and expected, the draft is cogent, well-organized, and grammatical. Hutchinson also has brought enthusiasm to our work together, which is infectious. And he's been thoroughly reliable. Indeed, he's a better co-author than many of my faculty colleagues at other universities with whom I have co-written books or articles in the past.

Hutchinson also took my first-year Property class last year (2022). He was one of the best members of the class. He spoke up on the first day of class and was subsequently one of the most reliable participants in class discussions. He knew the materials cold, and his comments showed analytical skill and insightfulness. He also wrote excellent answers to the final examination questions and earned an Honor in the class.

Hutchinson also stutters. I did not realize that when he first spoke up in my Property class because he somehow made a lengthy and elegant comment without his stutter ever appearing. The stutter, however, is frequently there. It's as much a part of Hutchinson as a birthmark or a tick. But it does not affect his ability to communicate clearly and effectively, which is what matters. I've known many students who do not stutter but are not good communicators. Hutchinson is a great communicator who stutters. It's telling that he is an aspiring podcaster. His stutter does not stand in Hutchinson's way.

Hutchinson is also highly personable. He is poised and deliberate, yet easygoing. He always seems to be in a good mood, and no task, no matter how difficult, seems to faze him. I've enjoyed every conversation with him. He is naturally inquisitive and interested in virtually everything. He is also an accomplished Spanish guitarist. (If you are interested in listening to him play, you can see him perform at a TED performance at UCLA here: https://www.youtube.com/watch?v=dl00spWTKIw.)

As you can tell, I'm an enthusiastic fan of Hutchinson. He has my strongest recommendation.

Sincerely,

/s/ Barton Thompson

StanfordLawSchool

JENNY S. MARTINEZ
Richard E. Lang Professor of Law and Dean

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Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes "Pass" (P) as the default grade for typically strong work in which the student has mastered the subject, and "Honors" (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

H	Honors	Exceptional work, significantly superior to the average performance at the school.
P	Pass	Representing successful mastery of the course material.
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory.
F	Fail	Representing work that does not show minimally adequate mastery of the material.
L	Pass	Student has passed the class. Exact grade yet to be reported.
I	Incomplete	
N	Continuing Course	
[blank]		Grading deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading deadline has passed. Grade has yet to be reported.

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

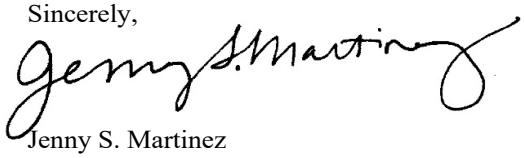
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

Lawrence M. Friedman
Marion Rice Kirkwood Professor of Law
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June 24, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am happy to write a recommendation letter for Hutchinson Fann, who is a student at Stanford Law School, and also my current research assistant. He is a graduate of Pomona College, where he graduated *magna cum laude,* and where he had an outstanding record. Political science was one of his major interests at that school.

This is an exceptionally gifted young man, as his transcript makes clear; his classroom performance at Stanford Law School has been exceptionally good. His transcript is peppered with Honors, and he is clearly one of the top students in a cohort of high-achievers. He is also an online editor of the *Stanford Law Review*. He is, in general, quite active in student affairs at the law school.

In early 2023, I posted a need for a research assistant; I had quite a few applicants, but I chose Hutchinson, whom I had not met before, after I interviewed him. He seemed the most promising, and the most intellectually ambitious of the group. This turned out to be a very wise choice. He has a lively mind and absorbs ideas and insights readily. He has proved to be an ideal RA. In the first stages of our work together, he did a good deal of the ordinary work of a research assistant: finding sources, checking these sources, filling in gaps in my own research, and, in general, helping me out. He was invaluable: he did his tasks with speed and rigor, and he showed enormous initiative. He was particularly helpful on two projects of mine: one dealt with the history of workers' compensation, and another on the history of abortion law. Both of these have now been accepted for publication, and I am very grateful to him for his help.

Hutchinson quickly proved himself indispensable. So much so, that I decided to make him a collaborator and co-author when I moved on to another project. This is a historical study of newspaper coverage of the abortion controversy and abortion law in the late 19th and early 20th centuries; and what press coverage reveals about the law and politics of abortion in the days before *Roe v. Wade*. Hutchinson is a full partner in this enterprise. He has done most of the work of collecting data from the primary sources that are at the core of the study. I am extremely impressed with his work, which has been done quickly, and accurately. He has also made valuable contributions to the analysis of the data, and to the range of conclusions we are drawing from the data. We expect to have a draft ready in the summer. In sum, his role in this project has been absolutely essential. I have also been impressed with his enthusiasm and his total reliability.

He is also, I should add, working with Professor Barton "Buzz" Thompson, of our faculty, on an issue concerning water rights in California. I believe Professor Thompson, too, has made him a co-author of the article. I think it is rare for a law student to be chosen by two separate faculty members to work in collaboration on publishable work. But Hutchinson is not an ordinary student. He is a person of great energy, who is capable of doing a great deal and with both speed and rigor.

Hutchinson has talents, interests, and skills, that would make him, I believe, an ideal clerk to any federal judge. He thrives on work. He is also, I should add, a very pleasant young man; and he will be a terrific lawyer someday. I strongly urge you to interview him. I would be happy to talk further if you think that would be helpful. In any event, he has my very high recommendation and endorsement.

Sincerely,

/s/ Lawrence M. Friedman

Robert Weisberg
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Associate Dean for Curriculum
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June 24, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I give my very warmest recommendation for Hutchinson Fann, Stanford J.D. 2024, for a clerkship. He is a superlative candidate across all dimensions.

I know Hutchinson well in three contexts: He was a terrific class participant in my section of the required first-year course in Criminal Law, and he wrote an exam that easily crossed the hurdle into the Honors range. He reprised that performance in the beginning of the 2022-2023 academic year in my elective in Criminal Investigation. That course requires the students to run the very difficult gauntlet of searches and seizures and interrogation law, and once again, Hutchinson was an active and acute class participant and scored an Honors exam. Let me emphasize that I am somewhat infamous at the law school here for giving very difficult exams—best described as time-pressured issue-spotters. This is not necessarily a compliment to me, but it does ensure that success on my exams is pretty much a guarantee of the most clerkship-relevant skills in legal reasoning and analytic writing. An excellent law student could have an unlucky bad day on my exam, but a merely fair law student could not have a lucky excellent day, so I am very confident in Hutchinson's abilities. I'll add that I developed a certain affection for him in class because of all his evident, very gentle graciousness and generosity in the way he participated in discussions and comported with other students. He's a very special person.

Now probably the most detailed recommendations for Hutchinson will come from two of my colleagues, Professor Buzz Thompson and Professor Lawrence Friedman. Obviously dazzled by his writing and intellectual depth, both of my colleagues have brought Hutchinson into partnership, indeed co-authorship, on major research projects. But I think I can add another dimension to what will surely be their exceptional recommendations.

During the spring of 2023, Hutchinson has been on a full-time externship in the Criminal Appellate Division in the US Justice Department. I agreed to be the faculty supervisor for this work. Aside from the student's work obligations, externs must provide their faculty supervisors with weekly so-called reflection papers in which they both report on their specific projects and offer more generalized jurisprudential thinking about what they've learned. In the best of these papers, the extern does not just talk about legal doctrine. Rather, the goal is to offer insights into professional norms and institutional structures, and behavior that they observe in the host agency. Notably, Hutchinson's office deals with lower court decisions that have been adverse to the government, and he has to advise his bosses on whether those decisions should be left standing or should be pursued further—most obviously, with the possibility of recommending to the Solicitor General that certiorari be pursued.

In the years I've been supervising externships, I've rarely seen reflection papers as wise, thoughtful, and creative as Hutchinson's. He has focused on a wide variety of topics ranging from how the federal DOJ deals with errors by local police under the Fourth and Fifth Amendments to all the nuances and complexities of the federal sentencing guidelines. The striking thing about his papers is that he first shows, as one would predict, a superior understanding of the legal issues in these cases but also a preternatural wisdom about the significance of the lower court holdings. He is always deeply thoughtful about the legal risks of them having some influence on other courts, counterbalanced by the likelihood of government success in the Supreme Court.

This combination of skills Hutchinson has evinced in these papers is, for me, an absolute guarantee of not just technical skill but also the legal and professional maturity that he will bring to the judge for whom he clerks.

If I can supply further information about Hutchinson, please let me know. Indeed, feel free to call me at your convenience via my cell phone: (650) 888-2648.

Sincerely,

/s/ Robert Weisberg

Writing Sample Cover Letter

Hutchinson Fann

This writing sample is a draft of a section of an appellate brief I wrote in May 2023, while interning at the Department of Justice, Criminal Appellate Section. I wrote this draft under attorney supervision and use it as a writing sample with my supervisor's permission. This draft differs from what the Department will ultimately file in court and does not necessarily represent the Department's views.

Given the ongoing nature of the case, in accordance with Criminal Appellate policy, I have changed the defendant's name to "Doe" and redacted citations to the record. This draft is my own work; I wrote the draft and edited it after receiving comments from my supervisor.

Because other parts of the brief explain the general facts of the case, those facts are not included in my draft. For context, Doe, a law enforcement officer, was convicted of wire fraud, federal program theft, a civil rights violation, and conspiracy, and he was acquitted on three counts related to an alleged cover-up of the civil rights violation. Co-defendants were convicted on some of the obstruction-related charges.

This section of the brief responds to Doe's contention that the district court sentenced him based on an erroneous understanding of the verdict.

Hutchinson Fann Writing Sample

I. The District Court Did Not Plainly Err in Determining Doe's Sentence.

Doe contends that the district court erred by using incorrect information in determining his sentence. Br. X. This contention is meritless.

A. Background

In calculating Doe's guidelines range, the Probation Office divided the counts into two groups. JA-XX. Group 1 covered wire fraud, federal program theft, and the conspiracy to commit both offenses. *Id.* Group 2 covered the civil rights offense. JA-XX. With respect to Group 2, the Probation Office applied a two-level enhancement for obstruction because Doe "attempted to destroy or conceal evidence and he lied to a law enforcement officer which significantly obstructed or impeded the investigation and prosecution of this offense." JA-XX. Doe objected to this enhancement. JA-XX. At the hearing for objections to the PSR, defense counsel argued that the sentencing guidelines were improperly calculated because the obstruction enhancement involved acquitted conduct. JA-XX. Counsel argued that because Doe was "found not guilty of tampering, falsification of records, or false statement," the obstruction enhancement should not apply. *Id.* The court sustained Doe's objection but noted that a court can consider acquitted conduct for a sentencing enhancement if the conduct was proved by a preponderance of the evidence. JA-XX.

At sentencing, the court began by listing the offenses of which Doe was found guilty: conspiracy, deprivation of civil rights, federal program theft, and wire fraud. JA-XX. The court noted that it had "sustained Mr. Doe's objection to the adjustment for

obstruction under Group 2 of the offenses." *Id.* The court then walked through the guidelines calculations, again correctly enumerating Doe's guilty offenses. JA-XX. Turning to Group 2, the court noted that no obstruction-related enhancement would apply because the court had sustained the "obstruction-related count." JA-XX. In his request for a non-custodial sentence, defense counsel brought the court's attention back to the multiple "charges in which [the jury] found [Doe] not guilty." JA-XX.

The court then reviewed the § 3553(a) factors and enumerated Doe's guilty offenses for a third time. JA-XX. In explaining why it found Doe's proposed list of comparator cases unpersuasive, the court noted that "[i]t's atypical that a public official would be convicted of deprivation of civil rights, federal program theft, and providing a false statement to the FBI at the same time." JA-XX. Then the court stated that "[the jury] did not convict on one of the counts, which I believe was the obstruction, and for that reason I sustained the objection to an obstruction count and Mr. Doe benefited from that because his guidelines actually became less." JA-XX. The court sentenced Doe to 46 months, the bottom of the guidelines range. JA-XX.

B. Standard of Review

This Court ordinarily reviews sentencing decisions for abuse of discretion. *United States v. Garcia-Lagunas*, 835 F.3d 479, 495 (4th Cir. 2016). But because Doe failed to object to the alleged sentencing errors, the Court reviews for plain error. *Id.* To establish plain error, the defendant bears the burden of showing (1) error that (2) was "clear or obvious, rather than subject to reasonable dispute," (3) "affected [his] substantial rights,

which in the ordinary case means he must demonstrate that it affected the outcome of district court proceedings," and (4) "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Puckett v. United States*, 556 U.S. 129, 135 (2009) (quotation marks omitted). "Meeting all four prongs is difficult, as it should be." *Id.* (quotation marks omitted).

C. The court did not make an error here, much less a clear or obvious error.

The court did not err here. Doe contends that three of the court's comments at sentencing illustrate that it misunderstood the counts on which he was found guilty. Br. X. Though he does not explain why this would constitute error, Doe's claim sounds in a due process right to be sentenced based on accurate information. *See United States v. Lee*, 540 F.2d 1205, 1211 (4th Cir. 1976) ("[Courts] recognize a due process right to be sentenced only on information which is accurate."); *Townsend v. Burke*, 334 U.S. 736, 741 (1948) (finding a due process violation when the defendant was sentenced "on a foundation so extensively and materially false"). Sentencing decisions may not be based on "misinformation of a constitutional magnitude." *United States v. Tucker*, 404 U.S. 443, 446-47 (1972). A mistake rises to the level of a due process violation, however, only when the information used by the court was both (1) materially false and (2) demonstrably the basis for the sentence. *Jefferson v. Berkebile*, 688 F. Supp. 2d 474, 485 (S.D. W. Va. 2010) (citing *Jones v. United States*, 783 F.2d 1477, 1480 (9th Cir. 1986)); *United States v. Pileggi*, 361 F. App'x 475, 480 (4th Cir. 2010) (Traxler, J., dissenting) (citing *United States v. Carr*, 66 F.3d 981, 983 (8th Cir. 1995) (per curiam)). Here, the

court's statements were not materially false, nor were they demonstrably the basis for the sentence.

i. The challenged facts were not materially false.

To begin, the facts in question were not materially false. A fact is materially false if it lacks "some minimal indicium of reliability beyond mere allegation." *United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984) (citation omitted). Errors rising to the level of material falsity involve serious, pervasive misunderstandings about the case. *See, e.g.*, *Farrow v. United States*, 580 F.2d 1339, 1358 (9th Cir. 1978) (discussing *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971)) (material error when a "sentence was explicitly based upon unverified, unreliable charges of very serious criminal conduct"); *Tucker*, 404 U.S. at 447 (material error when the sentence was based on two previous convictions that were "wholly unconstitutional").

Here, there was no material falsity; the record shows that the court understood that Doe was acquitted on all three counts that comprised the obstructive conduct. The court enumerated all of Doe's convicted offenses three times during the sentencing hearing and did not include any of the obstruction-related offenses. *See* JA-XX. Defense counsel himself brought the court's attention to the multiple "charges in which [the jury] found [Doe] not guilty." JA-XX. Yet Doe now claims that the court did not understand that "Doe was acquitted of three counts submitted to the jury and not just one count." Br. X. Doe points to three stray statements from the court during the

sentencing hearing to support his argument. Br. X. None of these statements show that the court made a material error.

First, Doe points to the court's statement that, "based on evidence presented to the jury, Mr. [Doe] and his codefendants attempted to conceal the unlawful deprivation of Mr. [victim]'s constitutionally protected rights." Br. X; JA-XX. This statement was correct. The court did not state that Doe was found guilty of counts related to this behavior; rather, the court stated that "evidence presented to the jury" indicated this behavior, which was true. JA-XX; *see United States v. Bernard*, 757 F.2d 1439, 1444 (4th Cir. 1985) (holding that a sentencing judge may consider evidence introduced about crimes for which the defendant was acquitted). Thus, there is no indication of material falsity here.

Second, Doe points to the court's observation, when considering Doe's proposed comparator cases, that "[i]t's atypical that a public official would be convicted of deprivation of civil rights, federal program theft, and providing a false statement to the FBI at the same time." Br. X; JA-XX. Although Doe was not convicted of providing a false statement, this stray statement does not show that the court actually believed Doe was so convicted, as the court repeatedly listed Doe's convictions correctly, without including the false statement. *See* JA-XX. Moreover, the court's overarching point in making this statement—that Doe's proposed comparator cases did not involve *both* a civil rights violation and financial fraud—was correct, which further points against material falsity. *See* JA-XX; *United States v. Stevenson*, 573 F.2d 1105, 1107 (9th Cir. 1978)

(no due process violation, despite a court's incorrect statement about a co-defendant's record, because the misstatement was part of a broader conclusion about the co-defendant's background that was supported by "substantially accurate" information).

Finally, Doe argues that the court mistakenly believed he was convicted on two of the obstruction counts because the court stated that "[the jury] did not convict on one of the counts, which I believe was the obstruction, and for that reason I sustained the objection to an obstruction count." Br. X; JA-XX. But the context of the court's repeated correct recitations of Doe's convictions contradicts this argument. *See* JA-XX. This context illustrates that the court here meant that Doe was acquitted of the obstructive *conduct*, which together constituted the Guidelines enhancement that the court struck. Br. X. The exact number of acquitted obstruction counts was not the point, as the court's qualification of "I believe" indicated. Br. X. After all, it would make little sense for the court to justify sustaining the objection to the obstruction enhancement on the grounds that Doe was convicted of two obstruction offenses and acquitted on one—without mentioning any distinction between the counts—as Doe's interpretation of the statement here would require. Br. X.

ii. The challenged facts were not demonstrably the basis for the sentence.

The facts in question were also not demonstrably the basis for the sentence. For a challenged fact to be demonstrably the basis for a sentence, the defendant must show that the "sentencing judge relied, at least in part, on this information." *United States v. Rachels*, 820 F.2d 325, 328 (9th Cir. 1987); *see Farrow*, 580 at 1359 (not demonstrably the

basis for the sentence when the court did not make it "abundantly clear that (the challenged information) was the basis for" the sentence). Here, there is no evidence that the sentence was based on acquitted conduct, so this basis for sentencing is certainly not demonstrable from the record.

Given that the obstruction-related conduct was grouped into Group 2 and the court sustained the obstruction enhancement, it would not have made any difference to the sentencing guidelines calculation whether the jury acquitted Doe on one count or three counts of the obstruction-related conduct. JA-XX; JA-XX. Nor did the court give any indication in explaining the sentence that the obstruction-related counts played a role in the court's final sentencing determination of 46 months, which was at the bottom of the guidelines range. JA-XX. Rather, the court emphasized that the factors motivating the sentence were Doe's "high position of trust" and "high-level status" that he abused, as well as the court's desire for consistency with [co-defendant Y's] sentence. JA-XX. The lack of any role, much less a prominent role, for the challenged information means that the information was not demonstrably the basis for the sentence. *See Carr*, 66 F.3d at 984 (not demonstrably the basis for the sentence when the record showed that another fact was the "valid and adequate basis for his sentence").

iii. The court did not make a clear or obvious error.

For the reasons above, Doe cannot establish that the court established any error in its sentence, let alone a "clear or obvious" error. *Puckett*, 556 U.S. at 135. As mentioned, each of the statements in question were clarified by the court's repeated

enumeration of the correct convictions during the sentencing hearing. JA-XX. Even if the stray statements in question created ambiguity in the court's otherwise established position (they did not), ambiguity falls short of "clear or obvious" error. *Puckett*, 556 U.S. at 135 ("[T]he legal error must be clear or obvious, rather than subject to reasonable dispute.").

D. Doe has not established an adverse effect on his substantial rights or the fairness, integrity, or public reputation of the judicial proceedings.

Doe also cannot show that the error affected his substantial rights. To show an effect on his substantial rights, Doe bears the burden of showing "a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 81-82 (2004) (citation omitted). The defendant cannot rely on the "mere possibility of prejudice"; rather, there "must be record-based evidence of prejudice." *United States v. Johnson*, 529 F. App'x 362, 371 (4th Cir. 2013).

Here, Doe cannot make this difficult showing. As explained, the alleged error did not affect the sentencing guidelines calculation. *See* JA-XX. And there is no evidence in the record that the alleged error affected the sentence imposed, given that the sentence was at the bottom of the sentencing guidelines and the court explained the sentence with valid factors and did not rely on the alleged error. JA-XX; *see United States v. Guajardo-Martinez*, 635 F.3d 1056, 1060-61 (7th Cir. 2011) (no plain error, despite the sentencing judge's error of considering two of the defendant's previous arrests, because

"the court did not rely solely on the arrests, and it is clear that even without the arrests, the judge would not have imposed a lower sentence"); *United States v. Evans*, No. 90-5524, 1991 WL 165231, at *2 (4th Cir. Aug. 29, 1991) (dismissing the defendant's due process claim because he did not meet his burden of showing that the district court relied on the disputed information at sentencing).

Finally, Doe has not established an adverse effect on the fairness, integrity, or public reputation of the judicial proceedings. The court relied on accurate facts in sentencing Doe at the bottom of the guidelines range and provided a thorough explanation of its decision, making this a routine case that supports public confidence in the judicial system.

Writing Sample 2 Cover Letter

Hutchinson Fann

This writing sample is a brief I wrote for my Federal Litigation course during my first year of law school. This assignment required drafting the plaintiffs' opposition to the defendant's motion to dismiss for *forum non conveniens* in a fictional case provided to us. This brief was edited by my instructor.

Fann Writing Sample 2

INTRODUCTION

This is a motion about whether this forum, Defendant's home forum closely tied to this case, is so oppressive that the case should be dismissed. Defendant is a Palo Alto pharmaceutical company who developed, and reaped hundreds of millions of dollars from, a drug that Defendant knew to carry risks of autoimmune disease. Defendant researched the drug in Palo Alto, developed the drug in Palo Alto, and tested the drug in Palo Alto. Indeed, all significant decisions regarding the drug were made in Palo Alto. Yet Defendant now moves to dismiss the case under what courts call the "drastic" doctrine of *forum non conveniens*, claiming that its home forum is so oppressive that the case should be litigated in Germany, where Defendant does not even have a single office and where Plaintiffs would struggle to bring essential evidence to trial. Defendant's motion is meritless. The case should remain in the present forum.

Plaintiffs, Ms. Sommer, Mr. Ersoy, and Mr. Bulsara, are three victims of Defendant's drug. Along with suffering from the painful, chronic symptoms of lupus, Plaintiffs' work lives have been turned upside-down by this drug. One victim, Mr. Bulsara, was forced to move out of his new home and leave his job in this forum because of his injuries. Plaintiffs chose this forum, Defendant's home forum, to sue in, a choice which is afforded deference. Furthermore, Plaintiffs may not get a remedy in Germany, where Defendant's own expert admits courts are not certain to exercise jurisdiction over Mr. Bulsara. Finally, trial in Germany would be cumbersome and costly, would preclude Plaintiffs from bringing essential evidence and witness testimony, and would deprive this forum of its interest in a case with a local corporation.

STATEMENT OF FACTS

Defendant, Palo Alto-based Highlands Pharmaceuticals, began developing Dyflozin, a "potentially groundbreaking" drug for people with type-2 diabetes, in 2008. Compl. ¶ 21. This research and development took place in Palo Alto, where Defendant's research and manufacturing divisions, its executives, and eighty-five percent of its employees work. Compl. ¶ 12. A year later, Defendant began to fund and closely monitor a study at the University of Medford, in Oregon, to test the efficacy and safety of Dyflozin. *Id.* ¶ 21. A year after the start of the study, researchers

from the University of Medford released a press release stating that some test subjects developed autoimmune disease. *Id.* ¶¶ 22-23. Then, the researchers, still receiving sponsorship from Defendant, published the results of their study in an article that Defendant edited. *Id.* This article did not mention any of the autoimmune effects of the drug. *Id.* ¶ 23. In its subsequent applications for approval by the EMA and FDA, Defendant did not mention any adverse autoimmune effects from Dyflozin. *Id.* ¶ 25.

The EMA approved Defendant's drug application for Dyflozin in 2015, and Defendant began selling Dyflozin in the E.U. a month later. *Id.* ¶ 26. Defendant's packaging for Dyflozin in the E.U. contained no warning about autoimmune complications, and Defendant has no office in the E.U. *Id.* ¶¶ 13, 26. FDA trials were more extensive and revealed signs of autoimmune disease from Dyflozin. *Id.* ¶ 27. The FDA advisory committee suggested the drug include a warning cautioning patients with pre-existing autoimmune disease against its use. *Id.* Defendant did not warn the FDA that Dyflozin was also a risk to patients with no prior history of autoimmune disease. *Id.* Unaware of this risk, the FDA approved Dyflozin, requiring only a warning label and recommending kidney function and antibody tests before using Dyflozin. *Id.* ¶ 28.

In April 2018, Plaintiff Farroqh Bulsara, who had been studying at U.C. Berkeley for two years, saw his doctor, Dr. Méndez, for his regularly scheduled check-up at the U.C.S.F. Medical Center. *Id.* ¶¶ 47-48. Dr. Méndez prescribed the now-FDA approved Dyflozin for Mr. Bulsara. *Id.* Mr. Bulsara finished his graduate studies a year later and accepted a full-time job at Google in Mountain View, CA. *Id.* ¶ 49. But by that fall, Mr. Bulsara developed "significant fatigue, chronic fevers, joint pain, and facial rash," and in January 2020, Mr. Bulsara was hospitalized. *Id.* Dr. Méndez diagnosed Mr. Bulsara with lupus in San Francisco, and Mr. Bulsara was forced to return to Germany, where he had family to care for him. *Id.* ¶ 50. Plaintiffs Zeki Ersoy, an elementary school teacher, and Giselle Sommer, a legal assistant, began taking Dyflozin in 2016 in Germany, until they developed lupus in 2019. *Id.* ¶¶ 36, 41, 44; Sommer Decl. ¶ 2.

The EMA recalled Dyflozin in 2020, citing a "significant risk" of autoimmune disease in people taking the drug. Compl. ¶ 30. The EMA had been alerted by reports of adverse effects of

the drug. *Id.* Dyflozin is no longer sold in the E.U. *Id.* Defendant continues to market and sell Dyflozin in the United States, where approximately 90,000 patients take Dyflozin, including approximately 5,500 patients in California. *Id.* ¶ 31. Dyflozin is Defendant's most lucrative product, accounting for $241 million in revenue in 2019. *Id.* ¶ 14; *About Us*, Highlands Pharms., Inc., https://fedlit.law.stanford.edu/about/about-us/ (last visited Feb. 20, 2022).

ARGUMENT

Because *forum non conveniens* results in the dismissal of an otherwise proper case, courts treat the doctrine as a "drastic" and "exceptional tool to be employed sparingly." *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011) (citation omitted). This means that "a plaintiff's choice of forum should rarely be disturbed." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981). Given the presumptive convenience of a plaintiff's chosen forum, the defendant bears a high burden of proof. *Carijano*, 643 F.3d at 1227. The defendant must show (1) that an "adequate alternative forum" exists, and (2) that a balance of "'private interest' and 'public interest' factors strongly favor trial in the foreign country." *Id.* at 1228-34 (quoting *Dole Food Co. v. Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002)). In this showing, the defendant must establish "oppressiveness and vexation to a defendant . . . out of all proportion to a plaintiff's convenience." *Id.* at 258 (citation omitted).

Here, Defendant cannot show that Plaintiffs' chosen forum is oppressive; the forum is Defendant's home forum with a close nexus to Plaintiffs' claims centered on Defendant's conduct at home. *See id.* at 1236 (finding a strong connection even where twenty-five Peruvians sued in California for contamination in Peruvian waters); *see also Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2002) (finding a strong connection where thirteen Dominican baseball players sued in California for claims including sexual harassment and fraud). Further, Defendant cannot show that Germany provides an adequate alternative forum, nor can it show that Germany will be more convenient for the parties and court. This motion to dismiss for *forum non conveniens* should be denied.

Fann Writing Sample 2

A. Plaintiffs' chosen forum warrants deference.

Plaintiffs' choice of Defendant's home forum warrants deference. Courts generally give deference to the plaintiffs' chosen forum, and especially so to claims with at least one domestic plaintiff. *Carijano*, 643 F.3d at 1228. In distinguishing between foreign and domestic plaintiffs, courts ask whether plaintiffs are trying "to take unfair advantage of an inappropriate forum," and these fairness concerns "are muted . . . where Plaintiffs' chosen forum is both the defendant's home jurisdiction, and a forum with a strong connection to the subject matter of the case." *Id.* at 1228-29.

Here, Plaintiffs chose Defendant's home forum, where more than eighty-five percent of its employees work, and where its key divisions are located. Compl. ¶ 12; *see Carijano*, 643 F.3d at 1229 (finding that a defendant's home forum deserved deference because the claims were "based on decisions made in and policies emerging from" its California corporate headquarters). Further, Mr. Bulsara has strong domestic ties. He was prescribed Dyflozin in the chosen forum; his injury arose in the chosen forum; and he had hoped to remain in the chosen forum, having accepted a full-time job in the forum. Compl. ¶ 49. The close connection of the forum to Plaintiffs' claims, and Bulsara's in particular, suggests Plaintiffs' choice of forum deserves deference.

B. Germany is not an adequate alternative forum.

Germany does not offer an adequate alternative forum. Courts consider a two-part test when determining whether an alternative forum is adequate. First, courts look to whether all parties come within the court's jurisdiction. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). Second, courts ask if the jurisdiction "offers a satisfactory remedy." *Piper Aircraft Co.*, 454 U.S. at 254-55. Here, German courts are not certain to exercise jurisdiction over Plaintiffs, and Plaintiffs may be prohibited, as a practical matter, from seeking a remedy in Germany.

First, Germany is not an available forum because it is uncertain whether a German court would exercise jurisdiction over Plaintiffs, especially Plaintiff Bulsara. *Forum non conveniens* requires that the "alternative forum has jurisdiction to hear the case." *Id.* at 242. German courts

exercise jurisdiction over tortious acts "committed" within their borders, which includes both where the injury was caused and where the injury "arose." Bach Decl. ¶ 7. Mr. Bulsara was prescribed Dyflozin in the United States in April 2018 and developed lupus in the fall of 2019, in the United States. Compl. ¶ 10. Thus, the tortious act and his injury occurred and arose in the United States. Dr. Bach, Defendant's expert, promises that German courts would "likely" exercise jurisdiction over Mr. Bulsara because he is a German national. Bach Decl. ¶ 9. But "likely" jurisdiction is insufficient. *Gilbert*, 330 U.S. at 507. Putting a finer point on it, the court in *British Telecomms. PLC v. Fortinet, Inc.*, 424 F. Supp. 3d 362, 369 (D. Del. 2019), rejected reliance on "a mere likelihood of jurisdiction in the alternative forum"; jurisdiction must be "actual" and "not potential or hypothetical." Without actual jurisdiction over all Plaintiffs, Germany cannot be relied on as an "available" forum. *Gilbert*, 330 U.S. at 507.

Second, Plaintiffs, three now-chronically ill individuals who have had to take extended time off of work due to Defendant's drug, would not be able, as a practical matter, to seek a remedy in Germany. Courts generally ask whether the remedy is "clearly unsatisfactory." *Piper Aircraft Co.*, 454 U.S. at 254; *see also Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 346 (8th Cir. 1983) (finding that the court must look to the "realities of plaintiff's position, financial or otherwise, and his or her ability as a practical matter to bring suit in the alternative forum"). In Germany, the lack of attorney contingency fees, the "loser pays" approach, and limited damages "deter[] people from litigating" Plaintiffs' claims. Telemann Decl. ¶ 15; *see Lehman*, 713 F.2d at 345 (finding the lack of a contingent fee system to weigh against dismissal). Here, Plaintiffs would face substantial *additional* obstacles to bringing their claims. Plaintiffs would, in three separate lawsuits, have to pay for court cases, costs, and expert fees in both Germany and California; hire sophisticated German counsel; and retain American counsel to compel the production of documents. Telemann Decl. ¶ 15. As Professor Telemann explains, Plaintiffs "could be required to pay more to their attorneys than they could win in damages." *Id.*; *see Reid-Walen v. Hansen*, 933 F.2d 1390, 1399 (8th Cir. 1991) (finding the inability to afford counsel in the alternative forum to be "an important factor counseling against dismissal"). Defendant is a

large corporation with thousands of employees who can afford to retain expensive counsel and litigate over the production of each document while Ms. Sommer, Mr. Ersoy, and Mr. Bulsara struggle for a remedy. Compl. ¶ 12. In effect, Plaintiffs have no adequate remedy in Germany.

C. Private interest factors weigh in favor of remaining in this court.

Private interest factors weigh in favor of the case remaining in this Court. Courts have articulated several factors considered as part of the "private interest" test set forth in *Gilbert*. 330 U.S. at 508 (listing private interest factors). Here, the relevant factors are: (1) the residence of the parties, (2) access to witnesses, (3) access to evidence, (4) the enforceability of the judgment, and (5) any other considerations. *Carijano*, 643 F.3d at 1230.

The residence of the parties weighs in favor of this forum.

First, the residence of the parties favors retaining the case in the present forum. Courts consider the parties' willingness to travel as well as their home residence. *Id.* Plaintiffs' complaint conveys their willingness to travel to California, Plaintiff Bulsara has strong ties to the forum, and Defendant is at home in the forum. Sommer Decl. ¶ 7; Ersoy Decl. ¶ 7; Bulsara Decl. ¶ 6; Compl. ¶ 12. In these three ways, the case resembles *Carijano*, where the court relied on the foreign plaintiffs' willingness to travel to the forum, a domestic plaintiff, and a home defendant to favor the chosen forum. 643 F.3d at 1230; *see also Ravelo*, 211 F.3d at 514 (finding that the defendant corporation's California headquarters, where the defendant reached out to baseball players in the Dominican Republic, weighed in favor of trial in the United States).

Material witnesses are in the United States and would be inaccessible in Germany.

Material witnesses are far more accessible in the present forum. First, courts weigh the "materiality and importance" of witnesses' anticipated testimony. *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1146 (9th Cir. 2001) (quoting *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1335-36 (9th Cir. 1984)). Second, courts determine the accessibility of witnesses by looking to where witnesses reside, whether witnesses can be compelled to testify, and the cost of obtaining witness testimony. *Bos. Telecomms. Grp., Inc. v. Wood*, 588 F.3d 1201, 1208 (9th Cir. 2009). Here, the material testimony will come from witnesses in the United States. Like the claims in

Carijano, Plaintiffs' claims center "on the mental state of the [managers] who actually made the business decisions" that led to the injury. 643 F.3d at 1230; *see also Ravelo*, 211 F.3d at 514. Plaintiffs allege negligence, strict liability, and fraud, which turn on testimony about Defendant's research, manufacturing, advertising, and warnings. Compl. ¶¶ 52-74. Witnesses who can testify to these events largely reside in the present forum, where all of Defendant's leadership resides. *Id.* ¶ 12; Telemann Decl. ¶ 19; *see Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1181 (9th Cir. 2006) (finding, in a conspiracy case, that availability of key corporate witnesses in the United States favored trial in the United States). Researchers from the University of Medford study, which establishes Dyflozin's risks and Defendant's knowledge of these risks, likely also live in the United States. Telemann Decl. ¶ 19. Strikingly, Defendant does not have even a single office in the E.U., where they ask the trial to be held. Compl. ¶ 12.

While the vast majority of material witnesses reside in the present forum, three witnesses, German doctors, reside in Germany. *Id.* ¶¶ 34, 40, 47. Mr. Bulsara's doctor in the United States, Dr. Méndez, resides in this forum. *Id.* ¶ 47. The testimony of these German doctors is far less material than that of the witnesses in Defendant's headquarters, given Plaintiffs' claims and the straightforward nature of the doctors' activity with respect to Defendant's drug. *Id.* ¶¶ 35, 41, 48. Here, Plaintiffs' claims focus on whether Defendant's American leadership misled physicians, the FDA, and the EMA, leading to Dyflozin's approval with few warnings. *Id.* ¶¶ 35, 41, 48. The German doctors simply prescribed two Plaintiffs an EMA-approved medication, Dyflozin, and "reasonably relied" on the drug's few stated risks, none of which manifested. *Id.* ¶ 72. The simple and routine nature of these pharmacy orders makes them substantially different from the surgeries at issue in *Kleiner v. Spinal Kinetics*, No. 5:15-CV-02179-EJD, 2016 WL 1565544, at *1, *4 (N.D. Cal. Apr. 19, 2016), where German physicians were found to be key witnesses because they implanted and removed the defendant's devices from the plaintiffs' spines.

Turning to the accessibility of this witness testimony, if this case is dismissed and refiled in three suits in Germany, then (1) German courts may not be able to compel the testimony of these material witnesses, (2) testimony that can be compelled will be in written form only, and

(3) testimony that can be compelled will be very costly to obtain. First, German courts may not be able to compel the testimony of material witnesses, as Defendant does not state that it will make U.S. witnesses available if called to testify in Germany. Telemann Decl. ¶ 28. In that instance, each Plaintiff would have to resort to the Hague Convention to seek each witness testimony. *Id.* The provision of this testimony is "not automatic," meaning each Plaintiff may have to initiate judicial proceedings. *Id.* ¶ 24. Second, any testimony that can be compelled will be in written form only. *Id.* ¶ 23. This is a significant limitation, as courts have found live testimony to be important in fraud cases, "where the factfinder's evaluation of witnesses' credibility is central to the resolution of the issues." *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 30 (2d Cir. 2002).

Third, if this case proceeds in Germany, testimony that can be compelled will be very costly to obtain. Plaintiffs will require the help of expensive U.S. counsel to litigate over the production of a potentially overwhelming amount of witnesses. Telemann Decl. ¶ 24. The fought-over witnesses would include all of Defendant's employees, as well as the University of Medford researchers. *Id.* In contrast, any of these witnesses would be easy to question if the case proceeds in this court. *Id.* ¶ 25. This ease of access to U.S.-based witnesses was equally true in *Tuazon*, a conspiracy case with a defendant American cigarette corporation and a plaintiff injured in the Philippines. 433 F.3d at 1163. There, bringing a "few witnesses" to the United States from the Philippines, in part to testify about the plaintiff's diagnosed pulmonary disorder in the Philippines, was less costly than uprooting the parties and the defendant corporation's entire apparatus. *Id.* at 1181. Here, similarly, the existence of only a few witnesses in Germany, and the many material witnesses in the United States, weighs in favor of the case remaining in this court.

Material evidence is in the United States and would be inaccessible in Germany.

Material evidence is far more accessible in the United States. As with witnesses, courts consider the (1) "materiality and importance" of evidence and (2) its "accessibility" to the forum. *Lueck*, 236 F.3d at 1146 (quoting *Gates Learjet Corp.*, 743 F.2d at 1335-36). First, the vast

majority of the material evidence here is in the United States. Plaintiffs' claims center around Defendant's research, failure to warn, and fraud, and Defendant's records and communication regarding the "development, testing, labeling, distribution, marketing, safety, [and] regulation" of Dyflozin are in the United States. Telemann Decl. ¶ 19. Any environmental evidence in Germany is less relevant to Plaintiffs' claims; the heart of the matter here is Defendant's conduct. Compl. ¶¶ 52-74. The centrality of Defendant's conduct here resembles *Tuazon*, where the evidence in a United States cigarette corporation's headquarters outweighed evidence of an injured plaintiff's smoking habits and activities in the Philippines. 433 F.3d at 1181.

The centrality of Defendant's conduct here makes the material evidence unlike that in *Piper Aircraft*. In *Piper*, the demonstrated material evidence surrounding a plane crash in Scotland was in Scotland. 454 U.S. at 239, 242. There was evidence that the crash was caused by Scottish pilot error; there was no evidence that the crash was caused by the plane's United States manufacturing; and evidence of the pilot's training, the plane's maintenance, and the investigations into the accident were in Great Britain. *Id.* Here, the facts are the reverse. There is evidence that Defendant's drug caused the injury and no evidence that any environmental factors in Germany played a role. Compl. ¶ 69. Thus, this case should, consistent with *Piper*, be resolved in favor of the court where the material evidence has been shown to be: this court.

Second, turning to the accessibility of material evidence, much of the material evidence would be inaccessible in Germany. Defendant qualifies its promise to produce its documents by stating that any production will be "subject to any valid legal objections or limitations imposed by German law." Lin-Sarkisian Decl. ¶ 6. Defendant has significant legal objections in hand. For one, the German Medicinal Products Act prevents the disclosure of documents "when non-disclosure is justified by an overriding interest of the pharmaceutical entrepreneur." Telemann Decl. ¶ 30. Given that Dyflozin is a "potentially groundbreaking" drug, Defendant could attempt to justify very limited disclosure on the basis of its own competitive interest. Compl. Ex. A. Other barriers to bringing material evidence in Germany include the lack of pre-trial discovery and the fact that plaintiffs are limited to only those documents which plaintiffs can specifically

identify. Telemann Decl. ¶ 26. Like in *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 639 (3d Cir. 1989), another fraud case with Germany as the alternative forum, the fact that German procedural rules so limit the production of internal documents weighs against dismissing the case.

Plaintiffs may struggle to enforce a judgment rendered in Germany.

The enforceability of a judgment rendered in Germany weighs against dismissing the case. Courts look to the ease of enforcing the foreign judgment in the United States and ask whether the defendant has agreed that a foreign judgment against it can be enforced in the United States. *Carijano*, 643 F.3d at 1232. Defendant has not agreed that a German judgment against it can be enforced in the United States, so Defendant can attack any future German judgment on due process grounds. *Id.* California courts have had to relitigate cases about German judgments in the past. *E.g.*, *Santa Margherita, S.P.A. v. Weine*, No. CV 12-03499 DSF (RZ), 2013 WL 12125539, at *1 (C.D. Cal. Oct. 28, 2013). Plaintiffs could thus each win a lengthy and expensive trial in Germany, and yet be subjected to another lengthy and costly trial in the U.S. and ultimately receive no remedy.

Other practical considerations, translation and impleader, weigh against dismissal.

First, the translation costs are a substantial difference between the two fora and support remaining in the present forum. *See Bos. Telecomms*., 588 F.3d at 1210 (finding translation costs relevant to private interests). Because so much of the material evidence is in the United States and in English, trial in Germany would require a massive amount of translation. First, considering documentary evidence, Defendant's records and communication regarding Dyflozin are in the United States and in English. Compl. ¶¶ 52-74. These records and communication will be overwhelming in quantity, as Dyflozin is Defendant's most lucrative drug, the drug has gone through several regulatory stages, and Defendant has over 4,000 employees. *Id.* ¶¶ 12, 14, 26-27. Trial in Germany would require translation of these mountains of records and correspondence at €70 an hour. Bach Decl. ¶ 15. Second, considering witness testimony, all of the relevant witnesses speak English. Compl. ¶ 47; *Leadership*, Highlands Pharms., Inc.,

https://fedlit.law.stanford.edu/our-leadership/ (last visited Feb. 20, 2022). Thus, trial in this forum will require no translation of testimony, while if this case occurs in Germany, testimony from all of Defendant's leadership, as well as from Dr. Méndez, will have to be translated. Indeed, the massive amount of translation that would have to occur if the case takes place in Germany reinforces the fact that this is an American dispute appropriate for this forum.

Second, Defendant has not met its burden of showing that its defense would be impaired without the ability to implead a third party. Courts ask whether the defendant has shown that impleader is "crucial to the presentation of [the defendants'] defense." *Reid-Walen*, 933 F.2d at 1398 (quoting *Piper Aircraft Co.*, 454 U.S. at 259). Here, Defendant has not offered any evidence that its defense depends on impleading a third party and thus has not met this burden.

D. The public interest factors weigh in favor of the case remaining in this court.

The public interest factors weigh in favor of the case remaining in this court. When considering the public interest factors, courts look to (1) the local interest in the lawsuit, (2) the court's familiarity with governing law, and (3) other judicial considerations, such as court congestion and the cost of resolving the dispute. *Tuazon*, 433 F.3d at 1181. Here, the local interest in the lawsuit, the court's familiarity with the law, and the other judicial considerations strongly weigh in favor of remaining in this forum.

This forum has a strong local interest in this case with a local corporation.

The local interest weighs in favor of remaining in this Court. Under either standard courts have used, the local interest favors the present forum. Most courts "ask only if there is an identifiable local interest in the controversy, not whether another forum also has an interest." *Id.* at 1182; *Bos. Telecomms*., 588 F.3d at 1212; *Carijano*, 643 F.3d at 1232. The *Lueck* court, in contrast, compared the interests of the two fora. 236 F.3d at 1147. Taking the local interest first, California has a clear interest in the case. Defendant, a California corporation, developed Dyflozin in California, and the actions of Defendant's employees in California led to the injury of one plaintiff in California. Compl. ¶ 12. As the court in *Carijano* stated, California has a "significant

interest in providing a forum for those harmed by the actions of its corporate citizens." 643 F.3d at 1232; *see also Bos. Telecomms*., 588 F.3d at 1212 (finding that California has an "interest in preventing fraud from taking place within its borders"). The impact of a case on the community deepens a strong local interest. 236 F.3d at 1147. Here, the ripple effects of the case will be felt in California and the United States, not Germany. Defendant has more than 3,400 employees in California, Compl. ¶ 12; sells Dyflozin to 90,000 patients in the United States, including 5,500 patients in California, *id.*; is traded on the American stock exchange, *id.* ¶ 31; and is advertising to hire even more employees in the United States, *see Job Openings*, Highlands Pharms., Inc., https://fedlit.law.stanford.edu/ (last visited Feb. 20, 2022). If compared to Germany's interest, as in *Lueck*, California has a much stronger interest than Germany, whose interest in the case is weak and attenuated. While two plaintiffs suffered harm in Germany, Defendant no longer sells any Dyflozin in the E.U., nor does Defendant even have a single E.U. office. Compl. ¶ 13. Given Defendant's customer base, any future cases against Defendant are overwhelmingly more likely to be in the United States than Germany. *Id.* ¶ 31. In sum, this forum has a far stronger local interest in hearing this case.

The court's familiarity with governing law weighs against dismissal.

The court's familiarity with governing law favors retaining the present forum. Absent a statute requiring venue in the US, courts give choice of law "much less deference" in a *forum non conveniens* inquiry. *Lueck*, 236 F.3d at 1148. When considering choice of law, California courts (1) ask if foreign law "materially differs" from California law, (2) determine each state's interest in its law being applied, and (3) select the law of the state that would be "more impaired" if its law were not applied. *Carijano*, 643 F.3d at 1233. Here, first, California and German law differ. *See Kleiner*, 2016 WL 1565544, at *7. Second, the analysis of each state's interest resembles the local interest analysis, and, as stated, this forum has a much stronger interest in applying its laws to the case. Thus, third, California law would govern, making the court's familiarity with governing law weigh in favor of remaining in the present forum. Telemann Decl. ¶ 9. If the case took place in Germany, the court would "reluctantly" apply unfamiliar California

law to Plaintiff Bulsara. *Id.* This factor reinforces the importance of this forum adjudicating this dispute.

Trial in Germany would be cumbersome and costly.

The factors of court congestion and the costs of resolving a dispute unrelated to the forum further support remaining in this court. First, Defendant has not raised any concerns about congestion, so Defendant has not met its burden to overcome Plaintiffs' choice of this forum. *See Tuazon*, 433 F.3d at 1182. Second, with respect to costs, if the case proceeds in Germany in three different districts, not only will the parties each have to pay for the translation of records and witness testimony from the United States, but Plaintiffs will also have to pay for litigation over the production of Defendant's documents from the United States. Telemann Decl. ¶¶ 20, 24. If the case is litigated in Germany, it will be a cumbersome and costly trial for all parties. *Id.* ¶ 25.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's Motion to Dismiss.

Applicant Details

First Name	**Ja'Brae**
Middle Initial	**C**
Last Name	**Faulk**
Citizenship Status	**U. S. Citizen**
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Applicant Education

BA/BS From	**North Carolina A&T State University**
Date of BA/BS	**May 2020**
JD/LLB From	**Washington University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014**
Date of JD/LLB	**May 10, 2024**
Class Rank	**I am not ranked**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations **Just the Beginning Organization**

Recommenders

Davis, Adrienne
adriennedavis@wustl.edu
Brazeal, Gregory
gregory.brazeal@usd.edu
605-658-3509
Fulton, Neil
neil.fulton@usd.edu
605-658-3500
Kippley, Amanda
amanda_kippley@fd.org

References

Professor Kimberly Norwood
norwood@wustl.edu
T: (314) 935-6416

Professor Travis Crum
crum@wustl.edu
T: (314) 935-1612

Judge Staci M. Yandle

judge_yandle@ilsd.uscourts.gov
T: (618) 439-7744

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ja'Brae Faulk
5522 Delmar Blvd.
Apt. 704
St. Louis, MO 63112
910-603-5510
F.jabrae@wustl.edu

June 26, 2023

The Honorable Stephanie Dawkins Davis
U.S. Court of Appeals for the Sixth Circuit
Theodore Levin United Staes Courthouse
231 W. Lafayette Boulevard
Detroit, MI 48226

Dear Judge Davis:

I am writing to apply for a clerkship in your chambers, either beginning in 2024 or for your next available position. I am currently a first-generation, third-year law student at the Washington University School of Law, where I serve as a Research/Teaching Assistant to the renowned scholar, Professor Adrienne Davis, and where I will serve as an instructor of an undergraduate course this upcoming fall.

I refined my legal writing and researching skills as a law clerk to the Honorable Judge Peguise-Powers during my first-year summer and during my second summer as a law clerk Judge Staci Yandle for the U.S. District Court for the Southern District of Illinois. In both of these roles, I conducted in-depth legal research and gained significant exposure to a wide variety of legal issues while gaining a broader understanding of day-to-day duties in a busy judicial chambers. As a transfer student, I was able to formulate a diverse group of mentorships with professors and practitioners alike in many different areas, including Professor James D. Smith in the area of intellectual property law, Dr. Khiara Bridges in feminist legal theory, and Judge Paul J. Watford in transitioning to the judiciary.

Enclosed please find my résumé, transcripts, and two writing samples. The first writing sample is a Judicial Order on behalf of the Honorable Staci Yandle I completed during my externship in her chambers. The second writing sample is an essay/article submission I completed for Education Law. The following individuals are submitting letters of recommendation separately and welcome inquiries in the meantime.

Professor Adrienne Davis
Washington University School of Law
Adriennedavis@wustl.edu
314-935-8583

Professor Susan Appleton
Washington University School of Law
appleton@wustl.edu
314-935-6449

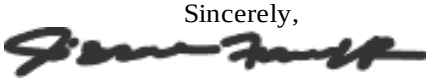
Dean Neil Fulton
University of South Dakota
Knudson School of Law
Neil.Fulton@usd.edu
605-658-3500

Professor Gregory Brazeal
University of South Dakota
Knudson School of Law
Gregory.Brazeal@usd.edu
605-658-3500

Mrs. Amanda Kippley
Federal Public Defenders
Amanda_Kippley@fd.org
605-330-4489

I would welcome any opportunity to interview with you. Thank you for your time and consideration.

Sincerely,



Ja'Brae Faulk

JA'BRAE FAULK

(910) 603-5510 | f.jabrae@wustl.edu | 5522 Delmar Blvd. 704, St. Louis, MO, 63112

EDUCATION

Washington University School of Law — St. Louis, MO
J.D. Candidate | GPA 3.08 — May 2024
Honors & Activities: Scholars in Law Award
Faculty Scholarship Workshop
Black Law Students Association

North Carolina A&T State University — Greensboro, NC
B.A. in Liberal Arts, cum laude — May 2020
Honors & Activities: Honor Society
Dean's List (2018-2020)
Student Government Association
National Black Law Students Association (Pre Law)

EXPERIENCE

African American Policy Forum — New York, NY
Research and Writing Summer Fellow — Summer 2023
- Provide research and writing assistance in furtherance of the #TruthBeTold campaign's fight for equal education
- Provide media assistance to Kimberlé Crenshaw and other notable jurists for public appearances

Washington University School of Law — St. Louis, MO
Instructor: Law, Gender and Justice — Fall 2023
- Co-teach a three-credit course in Department of Women, Gender, & Sexuality structured for pre-law students

Teaching Assistant to Professor Adrienne Davis, Critical Race Theory, Trust & Estates — Fall 2023
- Assist Professor Davis in instructing two doctrinal courses

Research Assistant to Professor Adrienne Davis — August 2022 - Present
- Assist Professor Davis in producing scholarship on topics including gender/race relations, theories of justice, and law and popular culture
- Redeveloped Washington University's Race & the Law course

U.S. District Court, Southern District of Illinois — East St. Louis, IL
Judicial Extern to the Honorable Judge Staci Yandle — Summer 2022/Fall 2023
- Drafted legal memoranda and conducted legal research on issues including compassionate release, habeas petitions, the Lanham Act, and summary judgement motions for the use of the court
- Observed hearings, trials and other court proceedings

Federal Public Defender's Office of North Dakota and South Dakota — Sioux Falls, SD
Judiciary Procurement Program — Spring 2022
- Assisted in various hearings, trials, and over 30 initial appearances representing indigent criminal defendants
- Interviewed witnesses and family members, worked with clients, and drafted and edited motions for the United States District Court and the United States Court of Appeals (Eighth Circuit)

Great North Innocence Project — Minneapolis, MN
Intern — August 2021-May 2022
- Completed 180 pro bono hours researching and writing for exonerations of convicted individuals

Robeson County Superior Court — Lumberton, NC
Judicial Extern to the Honorable Judge Tiffany Peguise-Powers — Summer 2021
- Drafted legal memoranda and conducted legal research on issues including burdens of proof for appeals from the District Court to the Superior Court in Robeson County and North Carolina sentencing guidelines
- Drafted court orders for the Judge's review

LANGUAGES/INTERESTS

Languages: Spanish (Proficient); Interests: anime, film, and piano

6/12/23, 10:22 AM

Washington University Unofficial Transcript for: **Ja'Brae Faulk**
Student ID Number: 515580 [Printer Friendly]
Student Record data as of: 6/12/2023 9:21:34 AM [How to: Save as PDF]

HOLDS - no records of this type found

DEGREES AWARDED - no records of this type found

MAJOR PROGRAMS

---------Semester--------- Admitted	Terminated	Status	Code	Prime or Joint	Program
FL2022		Open	LW0160	Prime	JURIS DOCTOR

ADVISORS - no records of this type found

SEMESTER COURSEWORK AND ACADEMIC ACTION

Note: Courses dropped with a status of 'D' will not appear on your transcript.
Courses dropped with a status of 'W' will appear on your transcript.

FL2022

Department	Course	Sec	Units	Opt	-----Grade----- Mid	Final	Dean	Dropped	WaitListed	Title
W74 LAW	528H	01	3.0	C		2.98				Media Law (Hoppenjans)
W74 LAW	535J	01	3.0	C		3.46				Comparative Law (Garlicki)
W74 LAW	578K	02	1.0	P		CR				Negotiation (Tokarz)
W74 LAW	604D	01	3.0	C		2.92				Adoption and Assisted Reproduction (Appleton)
W74 LAW	608F	01	3.0	C		3.16				Race & the Law (Davis)
W74 LAW	636A	01	3.0	C		3.04				Information Privacy Law (Richards)

Enrolled Units: 16.0 **Semester GPA:** 3.11 **Cumulative Units:** 46.0 **Cumulative GPA:** 3.11

MSN 8010 NOTE:, Transfer In (Univ of South Dakota): Torts, Contracts I/II, Criminal Law, Civil Procedure I/II, Property, Constitutional Law, Fundamental Legal Skills I/II **Transcript:** No **Expires** 12/31/2999

SP2023

Department	Course	Sec	Units	Opt	-----Grade----- Mid	Final	Dean	Dropped	WaitListed	Title
W74 LAW	538A	02	3.0	C		3.04				Corporations (Tuch)
W74 LAW	609T	01	3.0	C		2.92				The Law of the Fourteenth Amendment (Crum)
W74 LAW	642D	01	2.0	C		3.04				Corporate and White Collar Crime (Albus/Goldsmith/Harlan)
W74 LAW	643C	01	3.0	C		2.98				Copyright & Related Rights (Collins)
W74 LAW	718E	01	3.0	C		3.28				Education Equality, Equity and Fairness: K-12 (Norwood/St. Omer)
W74 LAW	718G	01	1.0	C		3.52				Higher Education Law (Steele)

Enrolled Units: 15.0 **Semester GPA:** 3.08 **Cumulative Units:** 61.0 **Cumulative GPA:** 3.10

FL2023

Department	Course	Sec	Units	Opt	-----Grade----- Mid	Final	Dean	Dropped	WaitListed	Title
W74 LAW	562C	01	2.0	C						Ethics and Professionalism in the Practice of Law (Pratzel)
W74 LAW	600T	82	1.0	P						Teaching Assistant
W74 LAW	802C	01	3.0	P						Supervised Instruction: Law, Gender and Justice
W76 LAW	832S	01	3.0	C						Contract Theory Seminar (De Geest)

Enrolled Units: 9.0 **Semester GPA:** 0.00 **Cumulative Units:** 61.0 **Cumulative GPA:** 3.10

OTHER CREDITS

Semester	Dept	Course	SIS Title	Type	Units	---------Units--------- AP Design	Topics	Dean Code	Req. Met	Art Sci	Comments
FL2022	W75	0006	Law School Elective		30.00						Univ of South Dakota

School: **Other Title:** **Original Grade:**

GPA SUMMARY

	Semester Units						Cumulative Units					Level	GPA		
Semester	Cr. Att.	Cr. Earn	P/F Att.	P/F Earn	Trans.	Grade Pts.	Cr. Att.	Cr. Earn	P/F Att.	P/F Earn	Trans.	Units	Sem.	Cum.	Level
FL2022	15.0	15.0	1.0	1.0	30.0	46.7	15.0	15.0	1.0	1.0	30.0	46.0	3.11	3.11	4
SP2023	15.0	15.0	0.0	0.0	0.0	92.9	30.0	30.0	1.0	1.0	30.0	61.0	3.08	3.10	5
FL2023	0.0	0.0	0.0	0.0	0.0	92.9	30.0	30.0	1.0	1.0	30.0	61.0	0.00	3.10	5

ENROLLMENT STATUS

Semester	Start	End	Enrollment Status	Level	Units	Status Change Date
FL2022	8/29/2022	12/21/2022	Full-Time Student	3	16.0	
SP2023	1/17/2023	5/10/2023	Full-Time Student	4	15.0	

DEMOGRAPHICS

Birthdate: 7/26/1998
Birth Place: Lumberton
Date of Death:
Gender: M
Marital Status:
Veteran Code:
Locale:
U.S. Citizen: Y
Country:
Visa Type:
Nonresident Alien:

Race: 9 - Multi-Racial Minority
Hispanic:
American Indian: Y
Asian:
Black: Y
Hawaiian Pacific:
White:
Not Reported:

Semester of Entry:
Entry Status:
Anticipated Deg Dt: 0524
Std Expt Graduation:
Frozen Cohort:
Faculty/Staff Child:
Alumni Code:
Prof. School1:
Prof. School2:
Area of Interest:
Area of Interest Code:

ADMINISTRATIVE CODES - no records of this type found

HIGH SCHOOL - no records of this type found

PREVIOUS SCHOOLS

Name	State	Code	Type Code	Type	Degree	Degree Date	Disciple Code	GPA	GPA Type	Credit
North Car Agr t St U	NC	005003		BS	LIB ARTS	0520		314		

UNIVERSITY EMAIL ADDRESS: f.jabrae@wustl.edu **FORWARDS TO:** f.jabrae@email.wustl.edu

Faulk, Ja'Brae Coran
203 Greenwell Dr
Hampton VA 23666-1732

Student Attended/Attending
the Following Regental Universities:
The University of South Dakota, Vermillion, SD

SEND TO : f.jabrae@wustl.edu

COURSE	COURSE TITLE	CRD	GRD	RPT
Beginning Fall 2003, credit earned from all six SD Regental Universities will be identified and displayed under the term header				
2020 Fall	**Institutional Credit - SD Board of Regents Universities**			
U LAW 701	TORTS	4.00	75	
U LAW 702	CONTRACTS I	2.00	68	
U LAW 704	CRIMINAL LAW	3.00	71	
U LAW 706	CIVIL PROCEDURE I	3.00	63	
U LAW 707	FUNDAMENTAL LEGAL SKILLS I	3.00	68	
U LAW 708	LEGAL RESEARCH FOUNDATIONS	1.00	93	
TERM ATT: 16.00 CMPL: 16.00 GPA: 70.938				
2021 Spring	**Institutional Credit - SD Board of Regents Universities**			
U LAW 703	PROPERTY	4.00	70	
U LAW 752	CONTRACTS II	3.00	78	
U LAW 754	CRIMINAL PROCEDURE	3.00	80	
U LAW 756	CIVIL PROCEDURE II	3.00	76	
U LAW 757	FUNDAMENTAL LEGAL SKILLS II	2.00	69	
U LAW 709	FOUNDATIONS OF LAW	1.00	94	
TERM ATT: 16.00 CMPL: 16.00 GPA: 75.875				
2021 Fall	**Institutional Credit - SD Board of Regents Universities**			
U LAW 810	CONSTITUTIONAL LAW	4.00	72	
U LAW 823	EVIDENCE	3.00	71	
U LAW 831	ADVANCED APPELLATE ADVOCACY	2.00	89	
U LAW 859	ANTITRUST LAW/CONS PROTECTION	3.00	88	
U LAW 860	INTELLECTUAL PROPERTY	2.00	65	
U LAW 895	PRACTICUM: INNOCENCE PROJECT	2.00	N	
TERM ATT: 16.00 CMPL: 16.00 GPA: 76.643				

COURSE	COURSE TITLE	CRD	GRD	RPT
2022 Spring	**Institutional Credit - SD Board of Regents Universities**			
U LAW 833	SALES AND LEASES	3.00	87	
U LAW 857	PROFESSIONAL RESPONSBILITY	3.00	67	
U LAW 876	FIRST AMENDMENT RIGHTS	3.00	76	
U LAW 892	TOP: DATA PROTECTION & PRIVACY	1.00	N	
U LAW 892	TOPICS: CYBER LAW	3.00	87	
U LAW 895	PRACTICUM: INNOCENCE PROJECT	2.00	N	
TERM ATT: 15.00 CMPL: 15.00 GPA: 79.250				

	ATT HRS	CMPL HRS	GPA HRS	GRADE PTS	GPA
TRANSFER	0.00	0.00	0.00	0.00	0.000
INSTI USD	63.00	63.00	58.00	4373.00	75.397
CUM	63.00	63.00	58.00	4373.00	75.397

********** END OF TRANSCRIPT **********

Washington University in St. Louis
SCHOOL OF LAW

June 13, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Ja'Brae Faulk

Dear Judge Davis:

I am writing this letter to recommend for your consideration Ja'Brae Faulk, who is applying for a position as a law clerk in your chambers. Based on his extraordinary intellect, exceptional academic background, and passion for the law in its myriad manifestations, I recommend him with the greatest of enthusiasm.

Let me start with Mr. Faulk's academic talents. From my many interactions with him--as my student, research assistant, teaching assistant, and co-author—I note that his understanding of the law is exemplary and that he is has a gift for reaching the crux of legal issues. He graduated from one of the nation's preeminent public HBCU's, North Carolina A&T, cum laude and with Dean's List honors. I note this because his undergraduate study of diverse philosophical thought traditions has translated into an astute and nuanced understanding of legal theory and history.

I also note that Mr. Faulk's commitment to clerking is authentic—he is deeply familiar with judicial chambers, having served as an intern for Robeson Superior Court Judge Tiffany Peguise-Powers during the summer of 2021 and federal district court Judge Staci Yandle last summer. He also worked for a semester with the Federal Public Defender's Office of North Dakota and South Dakota in their judiciary procurement program. Mr. Faulk views clerking as a necessary and crucial next step in deepening his comprehension of the law and regulatory structures and possibilities. I agree and believe that he would bring the same passion and commitment to clerking that he has brought to his academic study of law. Any chambers would be fortunate to have him join its team.

Washington University School of Law was fortunate to recruit Mr. Faulk as a transfer student last year. Some transfer students struggle to adjust to a new law school and to find community. Mr. Faulk is a case study in a successful transfer in every possible way. He has embraced the rich breadth of courses that we offer, exploring every aspect of the law and legal institutions. While he has a particular interest in intellectual property and education law, Mr. Faulk has also explored family and adoption, comparative law, negotiations, and corporate law. He is a true intellectual in the sense that he is deeply curious about the foundational principles that undergird various areas of law. He is the rare law student who seeks out additional readings for his classes—monographs and law review articles. He is voracious reader of all things legal. He is a frequent visitor to my office, brandishing a new book he has discovered and is passionate to share with me. I once referred in passing to a legal scholar, and within a few weeks he had read everything she had written and had a deep grasp on her scholarly interventions and career-long trajectory.

As a student in my class, Race and the Law, Mr. Faulk's mind literally stunned me. I have been studying this field for over thirty years. Yet several times, Mr. Faulk pulled his reading glasses up, peered out at me from the back row of the class, and set out a framework for understanding the legal questions that I had never encountered. It was, as I said, nothing short of stunning. I found myself racing to capture his insights on the class whiteboard, sketching out the contours of his insights and arguments, and later, after class, emailing with him to flesh out the claims and arguments. He is a tremendous student of the black letter law, legal and political institutions, regulatory structures, and the human element. He organically brings all of these together into what I know will be defining frameworks for future generations to encounter and interpret the law.

Not surprisingly, I hired Mr. Faulk as my research assistant during the fall semester, so that I could leverage his organic labor without guilt. We began to dissect each class together and compile a new syllabus for the next iteration of the class, as well as for the new class I am teaching this fall on Critical Race Theory. It is a testament to Mr. Faulk that I have hired him as my first ever Teaching Assistant. In this capacity, he is helping to design the syllabus and assignments, devouring cases and Law Review articles on the topic. Lest you fear that I am exaggerating my regard for Mr. Faulk's intellect and grasp of the law, let me share a brief example. Last fall Mr. Faulk was reminding me that the deadline for final exam was approaching and I jokingly told him that he should try writing a law school issue spotter. He did. And it was so good that I used it as the basis for an actual question. I share this to reinforce the extent of Mr. Faulk's grasp of the nuances of the legal doctrine and the foundational issues and conflicts that law raises.

Adrienne Davis - adriennedavis@wustl.edu

Mr. Faulk has become one of my principal interlocutors in all things law, not only course design, but also an unbelievably gifted editor of my writing. This is an especially important skill to highlight for Mr. Faulk. He is a gifted writer, lucid, persuasive, and elegant. I believe he would be an outstanding clerk in terms of writing memos and other documents that might be required. He has an expansive vocabulary, and, on occasion, he misuses a word, but this is something to which he has become attentive.

In addition to the academic and intellectual mandates, clerking requires strong relational skills and emotional intelligence. Mr. Faulk has this in abundance. As I noted, he transferred to Washington University this year and in a short period of time has fully integrated himself into our community. He is an active member of the Black Law Students Association and is a mentor to 1L students. He is an influencer among his peers and, from my observations from afar, seems to on occasion play a key role in resolving conflicts. At his previous institution, South Dakota Law, he was also a leader, as a member of the Native American Students Association, President of the Black Law Students Association, and, as an important indicator of the institution's confidence in him, a student member of the faculty hiring committee. In sum, Mr. Faulk's demonstrated ability to integrate himself rapidly and meaningfully into a small community bodes well for his future success as a law clerk.

I also want to say a word about how clerking would fit into Mr. Faulk's career horizon. I believe he could be an outstanding lawyer in any number of fields, intellectual property, education law, or civil rights if he chose. However, at this point he aspires to become a legal academic. This makes sense to me, as I have never met a student more organically passionate about the law than Mr. Faulk. He will have the opportunity to test this out this fall as he will be a Teaching Assistant for me and also an instructor for a course the School of Law regularly offers to undergraduates, Law, Gender, and Justice. I note that there is a highly competitive process for choosing the course instructors and it is an incredible honor and signal of the institution's confidence in Mr. Faulk's academic and professional accomplishments that he was chosen.

Finally, I note that Mr. Faulk grew up on the margins of society and is now thriving at its arguable center. He is a first-generation law student from a low-income background and was raised by his mother after his father passed away. He identifies as African American and Native American and brings both sensibilities to his world. He hails from Robeson County in North Carolina, which was the poorest county in the country for many years and is the home of the Lumbee, a tribe that has been seeking federal recognition for half a century. (I have learned a lot about the tribe from Ja'Brae.) More recently, Mr. Faulk lived in the D.C./Maryland/Virginia Metro area, an area in which his identity as a Black man was particularly salient. Mr. Faulk holds his identities not as a chip on his shoulder, but rather as invitational to connection with others. He is authentically true to himself, while also embracing all aspects of others' identities. I believe he brings unique perspectives that would benefit any judicial chambers.

In sum, I believe Mr. Faulk would prove an asset to your or any chambers. He has the analytic mind, research skill set, intellectual passion, and personal skills to succeed as a law clerk. If you have any questions regarding Mr. Faulk's application or qualifications, please do not hesitate to contact me at adriennedavis@wustl.edu.

Best,

/s/

Adrienne Davis
Vice Provost
William M. Van Cleve Professor of Law

Washington University School of Law
One Brookings Drive, Campus Box 1120
St. Louis, MO 63130
(314) 935-6420

UNIVERSITY OF
SOUTH DAKOTA
KNUDSON SCHOOL OF LAW

April 20, 2023

Re: Recommendation for Ja'Brae Faulk

Dear Judge:

Please accept this very enthusiastic recommendation for Ja'Brae Faulk to serve as a clerk in your chambers. I taught Ja'Brae criminal law in fall 2020 and criminal procedure in spring 2021, before he transferred to Washington University School of Law. Although both of my classes with Ja'Brae contained nearly eighty students, he stood out memorably through his exceptional contributions and insights. I was delighted that he reached out to me for a letter of recommendation. Ja'Brae is easily among the top five students that I would most enthusiastically recommend for a clerkship from the years I have been teaching at USD.

In Ja'Brae's time at USD, he made invaluable contributions to the intellectual life of our community, and not only through his leadership as President of the Black Law Students Association. His first semester, in fall 2020, began after the summer of nationwide protests in response to the murder of George Floyd, and Derek Chauvin's conviction arrived shortly before the final day of criminal procedure in spring 2021. Ja'Brae was the only male African American student in his 1L class at USD Law. His participation in our class discussions was transformative.

Ja'Brae was able to offer insights that no other student could, and his willingness to question the basic assumptions that are built into the traditional criminal law and criminal procedure curriculum expanded the conversation in extremely fruitful ways that I would have struggled to bring about on my own. Without Ja'Brae's contributions, the conversations throughout the year would have been much more limited and less enlightening for the many students who came from small towns in the region and had little exposure to or awareness of racial injustice in the U.S. criminal justice system.

I have no doubt that being in Ja'Brae's position imposed a great burden—on top of the usual, very significant challenges of 1L, and the additional challenges of attending law school during a pandemic. He carried the extra burden with determination and grace, and the entire law school benefitted from his generosity. Now that I know Ja'Brae is also a first-generation law student from a low-income background, raised by a single mother in Robeson County, North Carolina, his achievements seem even more extraordinary.

414 East Clark Street • Vermillion, SD 57069 • 605-658-3500 • 605-677-5417 fax • www.usd.edu/law
gregory.brazeal@usd.edu • ssrn.com/authorid=1539900

It was a great loss for USD Law when Ja'Brae transferred, although I appreciated the reasons behind his decision. There were and are extreme political divides in the student population, including what could fairly be described as deeply reactionary views among a small number of students. During an office hours visit with me, to take one example, a student expressed skepticism regarding Chauvin's responsibility for Floyd's death, arguing that Floyd died as a result of "excited delirium" due to drug use. Other students have expressed skepticism in class regarding the extent of discrimination against African Americans in U.S. history. Meanwhile, in Ja'Brae's second year, the state Board of Regents directed the closure of diversity centers on all state university campuses.

Law school is hard enough without having to be the only male African-American student in a politically polarized law school class in the middle of a nationwide debate on racial injustice in the U.S. criminal justice system. No law student should have to carry the burden that Ja'Brae carried during his years at USD. But it is a testament to his exceptional character that he was able to carry those burdens so successfully. At the law school, he is still very much missed.

In part because of Ja'Brae's experiences in South Dakota, I believe he will be able to offer a unique perspective as a clerk. I would be surprised if there are more than a handful of law students in the country who can speak with Ja'Brae's authority and insight about *both* the racial injustices of policing and criminal punishment in a large city such as Baltimore *and* about the racialized politics of criminal justice in a largely rural state such as South Dakota. The ability to speak across this rural-urban divide may become increasingly important in discussions of racialized mass incarceration in the United States as reforms continue to move forward sporadically in many large cities while meeting resistance in many rural areas. Ja'Brae is very well-positioned to become a leader in these conversations.

If I were a judge, I would not hesitate to hire Ja'Brae as a clerk. He is a highly driven, kind, insightful critical thinker and leader who will add a unique and urgently needed perspective to any judge's chambers. He is also a pleasure to work with. If you have any questions or would like to discuss Ja'Brae's application further, please do not hesitate to reach out.

Sincerely,

Greg Brazeal
Assistant Professor
USD Law School

UNIVERSITY OF
SOUTH DAKOTA
KNUDSON SCHOOL OF LAW

March 28, 2023

To whom it may concern:

It is my pleasure to write in support of Ja'Brae Faulk as a candidate for a judicial law clerk position. I believe Ja'Brae is a student of great potential who would be a very good judicial law clerk.

I was fortunate to meet Ja'Brae in his first year in law school. I would talk to him in the hallway as I do with many law students, but Ja'Brae took extra time to come to my office and meet. He asked thoughtful questions about legal study, his career path, and issues facing the law school. From the beginning, Ja'Brae sought to get involved beyond the classroom and to seek out mentorship.

I did not have Ja'Brae in class, but I know that his academic performance continued to improve during his time in law school. I believe that this reflects his willingness to take feedback, evaluate it and his performance, and thoughtfully incorporate feedback to improve. This is invaluable for any lawyer. Ja'Brae is an individual who continues to pursue growth rather than to simply be comfortable with the status quo. I believe that the lessons provided in a judicial clerkship would facilitate his ongoing growth and that he would be a clerk who continued to provide better and better work product.

Ja'Brae engages with people around him. He was actively involved in student life and made friends readily. He pushed other students to have difficult conversations about justice in important but respectful ways. Ja'Brae strives to understand the world around him as it is and as it can be. I think the experience of clerking will facilitate his ability to effectuate change and that he will be willing to share observations about how the justice system can improve.

Lastly, Ja'Brae is an energetic and engaging presence in his community. Having a cohesive and collegial team in chambers is important. I believe that Ja'Brae would be an excellent addition personally as well as professionally.

I am happy to answer any follow-up questions.

Sincerely,

Neil Fulton
Dean, University of South Dakota Knudson School of Law
414 E. Clark Street
Vermillion. SD 57069
605-658-3508
Neil.Fulton@usd.edu

FEDERAL PUBLIC DEFENDER
Districts of South Dakota and North Dakota
101 South Main Avenue, Suite 400
Sioux Falls, SD 57104

Jason J. Tupman
Federal Public Defender

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April 20, 2023

Dear Judge:

I am writing to recommend Ja'Brae Faulk for a judicial clerkship. I am an Assistant Federal Public Defender for the District of South Dakota, and I work in the Sioux Falls office. Ja'Brae was an intern with our office during spring 2022, and I was his direct supervisor. Based on my personal observations of Ja'Brae's work ethic and his temperament, I highly recommend him for a judicial clerkship.

Our office selected Ja'Brae as an intern based on his academic interests, his involvement in law school activities, and his commitment to indigent criminal defense. During his internship, Ja'Brae attended court hearings and client meetings, reviewed discovery, conducted legal research, and drafted documents. Ja'Brae displayed an excellent work ethic. He was inquisitive, positive, and self-motivated.

Ja'Brae demonstrated an ability to synthesize large quantities of discovery and conduct legal research on a wide variety of topics. He drafted motions for downward variance, sentencing memoranda, and legal research memoranda. He completed assigned projects in a timely manner and actively sought out new opportunities.

Ja'Brae has an excellent temperament. He was professional and respectful in his communications with our office staff and the court. He worked well as part of a team and actively engaged in case discussions. Ja'Brae brought a unique perspective to our work and a strong commitment to diversity. Most importantly, he treated all our clients with dignity and respect. If you would like to discuss this recommendation further, please do not hesitate to contact me at (605) 330-4489 or amanda_kippley@fd.org. Thank you for your consideration.

Sincerely,

Amanda D. Kippley
Assistant Federal Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 15-cr-30075-SMY**
	)	
TERRELL MCGEE,	)	
	)	
Defendant.	)	

ORDER

YANDLE, District Judge:

Defendant Terrell McGee was sentenced on August 17, 2017, to 300 months imprisonment for conspiracy to interfere with commerce by robbery (two counts), interference with commerce by robbery (two counts), and carry and use of a firearm during a crime of violence (two counts) pursuant to a written plea agreement (Doc. 175). McGee is currently housed at FMC-Devens and his projected release date is January 6, 2039.

Now pending before the Court is McGee's Motion for Compassionate Release pursuant to the First Step Act of 2018 in which he seeks release due to the COVID-19 global pandemic (Doc. 298). The Government has responded in opposition (Doc. 304). For the following reasons, the motion is **DENIED.**

Background

COVID-19 is a contagious virus spreading across the United States and the world. Individuals with serious underlying medical conditions, such as serious heart conditions and chronic lung disease, and those who are 65 years of age and older carry a heightened risk of illness from the virus. People Who Are at Higher Risk for Severe Illness, CENTERS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-

precautions/people-at-higher-risk.html (last visited June 21, 2022). As of June 28, 2022, there was one positive COVID-19 case among inmates and no positive staff members at FMC-Devens. Unfortunately, 13 inmates have died at FMC-Devens since the pandemic began. *See* https://www.bop.gov/coronavirus/ (last visited June 28, 2022). FMC-Devens has a current inmate population of 957. *See* https://www.bop.gov/locations/institutions/mcr/ (last visited June 28, 2022).

McGee is 31 years old and has suffered a pulmonary embolism (Doc. 298). He states that he is at risk for severe illness due to his condition and the continued presence of COVID-19 at the facility. He also asserts that the stacking of his 924(c) convictions should be considered under the First Step Act for compassionate release and that his mother requires assistance in caring for his son while he is serving his term of imprisonment. *Id*.

Discussion

The spread of COVID-19 has presented extraordinary and unprecedented challenges for the country and continues to present a serious issue for prisons, despite the safety protocols and policies that have been implemented. Section 603 (b)(1) of the First Step Act permits the Court to reduce a term of imprisonment upon motion of either the Director of the Bureau of Prisons ("BOP") or a defendant for "extraordinary or compelling reasons" so long as the reduction is "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A)(i). A defendant seeking compassionate release must first request that the BOP file a motion seeking the same. *Id*. If the BOP declines to file a motion, the defendant may file a motion on his own behalf, provided he has either exhausted administrative remedies or 30 days have elapsed since the warden at his institution received such a request, whichever is earliest. *Id*.

McGee alleges that his diagnosis of a pulmonary embolism puts him at a heightened risk

for COVID-19 infection. According to the CDC, individuals diagnosed with a pulmonary embolism may be at an increased risk of severe illness if they contract COVID-19. (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html). Significantly, however, McGee has refused to take the vaccine and has failed to demonstrate that he is unable to medically benefit from the vaccine

Exposure to COVID-19 is the same whether a person is confined or in the free world. Thus, an inmate refusing the vaccination may not benefit from compassionate release without presenting evidence that demonstrates he or she is unable to benefit from the vaccine. *See United States v. Barbee*, 25 F.4th 531 (7th Cir. 2022); *United States v. Broadfield*, 5 F.4th 801, 803 (7th Cir. 2021) ("A prisoner who can show that he is unable to receive or benefit from a vaccine still may turn to [the compassionate release] statute."). McGee has presented no such evidence.

McGee also contends that the First Step Act's changes to the 924(c) penalty structure presents extraordinary and compelling reasons for compassionate release because his sentence would be substantially less if the First Step Act was in effect at the time of his conviction. But the Seventh Circuit has held that non-retroactive changes in sentencing law do not constitute extraordinary and compelling reasons for compassionate release; new sentencing laws cannot alter a person's pre-existing sentence unless the law was enacted to do so *United States v. Thacker*, 4 F.4th 569, 575 (7th Cir. 2021). As the Court explained, Congress intended the anti-stacking amendment to be applied prospectively only – to sentences imposed *after* ratification of the First Step Act. *Id* at 574. As such, McGee is unable to benefit from the First Step Act's changes to the 924(c) penalty structure.

Lastly, McGee asserts that he is the primary caretaker for his minor son and his mother is "struggling to [omit] take care of him on her own." (Doc. 298, at p. 1). While the Court

understands McGee's concerns in this regard, they are not extraordinary and compelling reasons for release under the First Step Act of 2018.[1]

For the foregoing reasons, Defendant's Motion for Compassionate Release pursuant to 18 U.S.C. § 3582 (c)(1)(A) as amended by the First Step Act of 2018 (Doc. 298) is **DENIED**.

IT IS SO ORDERED.

DATED: June 28, 2022

STACI M. YANDLE
United States District Judge

[1] Given the absence of extraordinary and compelling reasons to support McGee's request for release, the Court need not consider the 3553(a) factors. That said, the Court believes that nature of and facts and circumstances surrounding the crimes he committed and his conduct while incarcerated weigh heavily against his release. McGee was convicted for his participation in two violent robberies in which the individuals were shot and seriously wounded during both. Since his incarceration, he has acquired 14 violations (Doc. 304, at p. 16; 304-3). Thus, he continues to pose a significant danger to the public.

[1][2]Interest Re-Convergence: Bell's Implicit Theory

"History has validated the concerns which motivated us back then. Time has vindicated us; we were prophets, not heretics."

- Kevin Brown

Attacks on critical race theory and diversity have occurred since the emergence of both concepts. Derrick Bell's initial critiques of the shortcomings of Brown v. Board, which instigated a theoretical group that matriculated into mainstream academics and society, is being eliminated across the nation. Bell's astuteness in his arguments has become one of the most useful tools in identifying the current status of Black existence and its interplay with dominant American culture. While a positive understanding of Bell's theory of interest convergence is instrumental in conceptualizing the factors influencing the Brown decision, a contrapositive understanding of this theory holds equal value in conceptualizing the elimination of CRT and diversity from educational spheres and will show Bell had a pristine gaze into the future. This essay attempts to reanalyze the conceptualizations of Bell's theory regarding the defectiveness of the American government as it seemingly set aside its obligations for racial equality under the Fourteenth Amendment and the Brown decision to remedy racial disparity. This essay draws connection between the emergence of CRT as theorem and the emergence of diverse concepts introduced into the academy and society and draws largely on Bell's theory of interest convergence when analyzing the current status of these concepts. This essay argues the realignment, or "re-convergence", of interests of white elites with working class and poor whites has influenced acts beyond subordination of Black people in America and connects the elimination of CRT and diversity to racial obliteration.

[1] [This is the most current version of my article to be submitted for publication in the near future]
[2] [Portions of this paper have been significantly reduced to fit the page limit for clerkship applications]